Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES TALLY, etc.,

Petitioners,

v.

STATE OF OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Oklahoma Supreme Court in ignoring the clear precedent of the United States Supreme Court and its own precedent established by applying the holdings of the United States Supreme Court, constitutes a denial of due process of law to petitioners in petitioners' requests to disqualify individual Justices of that Court for bias and prejudice.

2. Whether the disqualification of an influential Justice of a State Supreme Court as a result of apparent bias and prejudice late in the adjudicating proceeding when coupled with other irregularities by participating Justices who refused to disqualify, violated petitioners' due process rights.

3. Whether the language of the Oklahoma anti-cockfighting statute fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty and violates petitioners' due process rights.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

JAMES TALLY, Petitioner, an individual, on behalf of himself and a class of all persons similarly situated;

STATE OF OKLAHOMA, Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

Petitioner, on behalf of himself, and others similarly situated, petitions for a writ of certiorari to review the judgment of the Oklahoma Supreme Court in this case.

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE BELOW

The opinion of the Oklahoma Supreme Court is reported as *Edmondson v. Pearce*, 2004 OK 23, 91 P.3d 605. App. 1. This opinion follows *In Re: Initiative Petition No. 365, State Question No. 687*, 2001 OK 98, 55 P.3d 1048. App. 109. Unreported Orders of that court are shown at App. 123, 125, 134, and 137.

BASIS FOR SUPREME COURT JURISDICTION

The Oklahoma Supreme Court entered its decision on March 30, 2004. App. 1. Petitioner seeks review of the judgment on a writ of certiorari.

On May 10, 2004, petitioner timely filed a petition for rehearing in the Oklahoma Supreme Court. On June 7, 2004, the Oklahoma Supreme Court filed an order denying the petition for rehearing. App. 137. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the judgment of the

Oklahoma Supreme Court, the highest Court in the State of Oklahoma.

CONSTITUTIONAL PROVISIONS AT ISSUE

The First Amendment of the United States Constitution as applied to the State by the Fourteenth Amendment that there shall be no law " . . . abridging the freedom of speech, . . . ; or the right of people peaceably to assemble,. . . . "

The Fifth Amendment to the United States Constitution which provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution which provides in pertinent part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Factual Background of Litigation

In September, 1999 Initiative Petition 365 ("IP 365") was filed with the Oklahoma Secretary of State seeking to ban cockfighting in Oklahoma. In December, 1999 the initiative petition proponents submitted their signed petitions to the Secretary of State that had been gathered during the ninety day initiative petition campaign. The campaign was highly controversial and dominated the news and editorials in Oklahoma. From the onset of the

campaign and continuing through the election process, the major metropolitan newspapers strongly editorialized in favor of the initiative and against cockfighting.

Petitioner James Tally serves as President of the Oklahoma Gamefowl Breeders Association, the organized proponent of cockfighting in Oklahoma and the lead opponent of IP 365.

Petitioner Tally and his organization timely filed their protest in the Oklahoma Supreme Court to IP 365 contending that it lacked sufficient valid signatures of registered voters as required by state law to be allowed to go to a vote of the electorate. The Oklahoma Supreme Court referred the signature challenge to its Referee as a fact finder to provide to the Court findings and conclusions in the signature challenge. The appointed Referee had historically heard all initiative petition signature challenges for the preceding twenty years. The Referee conducted a five week long trial on the signature challenge and on November 28, 2000 filed his final report, his Corrected Referee's Report. App. 80. He determined that IP 365 **did not** contain sufficient valid signatures for the initiative to be submitted to the vote of the people. It obviously did not! In reaching that conclusion, the Referee had considered the testimony of eighty-nine witnesses and had reviewed thousands of pages of exhibits. The transcript of the proceedings was voluminous consisting of 4,555 pages.

On November 13, 2001, the Oklahoma Supreme Court entered its opinion declaring IP 365 to have a sufficient number of valid signatures for submission to the vote of the people. App. 95. The Court rejected the conclusions of its own Referee, the first time it had ever done so on

initiative petition signature challenges. Also, for the first time in history the Oklahoma Supreme Court announced in its opinion that its review of the Referee's Report was *de novo*. Previously the Supreme Court's review of its Referee's Reports on signature challenges had been to determine if there was sufficient evidence in the record to support the Referee's conclusion. According to the Supreme Court's own docket in that case, it was obvious that the Justices could not have read, reviewed, or considered the entire record considered by its Referee to evaluate it on a *de novo* basis. Only one original of the voluminous transcripts and the numerous exhibits was available to the eight Justices for their individual review and consideration of the record made before the Referee. The Supreme Court Clerk's records show that the record was with the Court only eighteen days before the decision was issued.

In the Court's November 13, 2001 opinion (App. 95), the Court based it upon certain stated facts and erroneous factual conclusions that were totally alien to the record considered by its Referee. The Court actually created nonexistent facts to support its opinion while disregarding its own Referee's findings and conclusion. Had the Justices reviewed the entire voluminous record on a *de novo* basis, they would have been aware of the glaring factual errors that appeared in the opinion. Most significantly, it was a unanimous opinion of the eight Justices participating in the decision. All of them concurred in the grossly erroneous recitation of the critical created facts in the opinion which the Court used to justify its rejection of the Referee's conclusions.

The Petitioners then sought a rehearing wherein they addressed the gross factual irregularities in the opinion. The gross irregularities created to support the Supreme

Court's opinion also caused Petitioners to investigate the possible reasons for such irregularities. The Justice authoring the opinion, Justice Winchester, it was discovered, is married to a member of the Oklahoma House of Representatives who had voted against the cockfighters in the legislature. Petitioners' sought to disqualify Justice Winchester, but soon learned that the Oklahoma Supreme Court had no due process procedures for a disqualification challenge to a Justice. No hearing was allowed on the disqualification challenge, but on July 2, 2002, the Supreme Court unanimously rejected the disqualification of Justice Winchester. Ever since Justice Winchester was asked to disqualify, all of the decisions of the Oklahoma Supreme Court relating to cockfighting issues have been rendered as *per curiam* opinions, all unanimously against the cockfighters.

Also on July 2, 2002, the Supreme Court, by a unanimous vote, responded to Petitioners' motion for rehearing by issuing a corrected opinion which vitiated the November 1, 2001 opinion, but again rejected by unanimous vote the Referee's Corrected Report in finding that there were valid signatures on the initiative petition. *In re Initiative Petition No. 365, State Question No. 687,* 2001 OK 98, 55 P.3d 48. App. 109. In its new opinion, the Court did not explain its use of created facts in its first opinion. It just ignored its gross errors in its first opinion.

On July 22, 2002, Petitioners sought a rehearing and sought to disqualify the Honorable Justices of the Supreme Court by identifying numerous irregularities by the Justices indicating extreme bias in favor of the anti-cockfighting measure and against the cockfighters. On August 7, 2002, the Court, without a hearing, summarily denied Petitioners' Petition for Recusal of the Justices.

Petitioners' request for rehearing on its opinion approving the validity of IP 365 was also summarily denied on August 15, 2002.

Petitioners do not seek review of the foregoing orders, but recite the related facts to provide a background to show the obvious bias and prejudice of the Oklahoma Supreme Court Justices against Petitioner and in favor of the politically correct and journalistically endorsed law against cockfighting in Oklahoma, which bias and prejudice extended into the opinion giving rise to this proceeding.

B. Background of Oklahoma Supreme Court Justice Disqualification Request.

Following the Oklahoma Supreme Court's decision denying the signature challenge on November 4, 2002, IP 365 was submitted to a vote of the people. It was a highly contentious campaign, with the state's major metropolitan newspapers editorializing very strongly in favor of banning cockfighting in Oklahoma. The campaign focused on the general idea of banning cockfighting, not on the specific constitutionally infirm language of the initiative. The measure was approved by the electorate and it became the law in Oklahoma on November 8, 2002, although it had been rejected by voters in fifty-seven of the seventy-seven counties in Oklahoma. The law is cited at Title 21, Oklahoma Statutes, §§ 1692.1-1692.9, in the Oklahoma statutes. App. 3-5, footnote 1.

The petitioners immediately filed actions in state district courts challenging the constitutionality of the new law. The District Court of McCurtain County, Oklahoma entered a temporary injunction against the enforcement of

the law pending a full hearing on the constitutionality of the law. District Courts throughout Oklahoma followed the lead of the McCurtain County District Judge.

The Oklahoma Attorney General filed in the Oklahoma Supreme Court his Application to Assume Original Jurisdiction and Petition for Declaratory Relief seeking to remove the cases from the District Courts. On January 24, 2003, Petitioners filed their application to disqualify the Justices of the Oklahoma Supreme Court identifying certain specific improprieties and irregularities indicating bias and prejudice that appeared to compromise their ability to render a fair and objective opinion on cockfighting issues. The Court has no procedures for considering a disqualification challenge of individual Justices, but it appointed one of its own Referees to be a fact finder on the disqualification issues. Petitioners objected to the appointment of the Court's own Referee since he is directly subject to the Justices' influence and control. They hired him. They can fire him. The Court summarily rejected Petitioners' objection.

To prepare for the fact-finding hearing before the Referee, Petitioners sought discovery of critical, non-deliberative and non-judicial to try to determine the reasons for the Justices' obvious bias and prejudice against Petitioners. Discovery was denied by the Court and the challenged Justices refused to cooperate in any discovery. Before the disqualification hearing before the Referee occurred, Vice-Chief Justice Opala, a highly distinguished and influential Justice on the Court for twenty-six years, personally disqualified at Petitioners' request when it was disclosed in *The Oklahoman,* a prominent state newspaper and a very vocal opponent of the cockfighters, that Justice Opala was a "loyal friend" of that newspaper. Justice

Opala, the news article disclosed, had been a guest of the newspaper in an overnight centennial celebration junket to Las Vegas. Prior to his disqualification, Justice Opala had participated in all the decisions regarding the challenges to the anti-cockfighting law and never failed to act consistent with the editorial positions of *The Oklahoman* against the cockfighters.

The disqualification hearing before the Referee as to the remaining seven Justices was meaningless. All of the remaining challenged Justices refused to appear at the hearing or respond to any of the non-deliberative bias and prejudice issues before the Referee. The Justices stonewalled the proceeding causing the hearing to be meaningless. The Referee concluded that the remaining Justices need not disqualify. App. 126. On September 8, 2003, the Supreme Court, acting through the remaining seven Justices, unanimously approved an order rejecting the disqualification challenges. App. 134. Those seven Justices thereupon embarked upon adjudicating the constitutionality of the anti-cockfighting statute.

C. Constitutionality of Anti-cockfighting Statute Issue.

The issues of the constitutionality of the anti-cockfighting law were thoroughly briefed by both sides. The language of the challenged anti-cockfighting measure is unique to Oklahoma. Although many other states have banned cockfighting, none has done so with the same language of Oklahoma's statute. Petitioners contended before the Oklahoma Supreme Court that the measure is seriously flawed according to basic principles of the U.S. Constitution. Being enacted through the initiative petition

process, its language was not subjected to the legislative hearing process. It was drafted by animal rights people.

On March 30, 2004, the Oklahoma Supreme Court issued its fifty-five page opinion assuming original jurisdiction over the constitutional issues, taking the case from the State District Courts, and granting the declaratory relief requested by the Attorney General adjudicating the anti-cockfighting law to be constitutional. App. 1. The declaratory relief was granted without the benefit of an evidentiary hearing or any consideration of many relevant facts. Petitioners contend that the Oklahoma Supreme Court erred in its ruling.

Petitioners seek this review of the actions of the Oklahoma Supreme Court as to due process issues related to disqualification of Justices and as to the constitutionality of the subject statute.

REASONS FOR GRANTING THE WRIT

The language of the Oklahoma anti-cockfighting statute, Title 21, Oklahoma Statutes, §§ 1692.1-1692.9 (App. 3-5, footnote No. 1), adopted through initiative petition, is contended by petitioners to be constitutionally infirm, contrary to the holding by the Oklahoma Supreme Court, *Edmondson v. Pearce,* 2004 OK 23, 91 P.3d 605. App. 1. However, the Oklahoma Supreme Court's holding in that case is overshadowed and has been influenced by the disqualification issues not addressed in that opinion. The irregularities demonstrating the bias and prejudice of the Oklahoma Justices is shown from the inception of their involvement in the anti-cockfighting initiative. The irregularities must be considered in the light of the highly

contentious and controversial nature of the cockfighting issue in Oklahoma. They involve serious due process issues that have been highly prejudicial to Petitioners in their appearances before the Oklahoma Supreme Court.

The initiative campaign against cockfighting attracted hundreds of thousands of dollars from out-of-state animal rights money interests. Oklahoma was the last of three states where cockfighting was legal, the only others being Louisiana and New Mexico. Cockfighting in Oklahoma was a multi-million dollar business, concentrated in the rural counties of Oklahoma, but having participants from all walks of life. The prominent state newspapers aggressively editorialized in favor of banning cockfighting in Oklahoma claiming cockfighting was detrimental to Oklahoma in the eyes of the rest of the country. It was the politically popular view in the higher population areas of the state to be opposed to cockfighting in Oklahoma. This view dominated as the voters in the metropolitan counties of the state caused the initiative to be adopted. It was rejected by voters in fifty-seven of the state's seventy-seven counties.

Although the judiciary is normally not guided by political or journalistic influences, the manner in which the Justices of the Oklahoma Supreme Court handled the anti-cockfighting issues before that court clearly establishes the existence of a bias or prejudice that interfered with the Justices' ability to fairly and properly adjudicate the issues before them. Each individual Justice was very much aware that he or she would become the subject of intense editorial criticism from the state's largest newspapers if any action was taken by the Court to impede the adoption of a ban on cockfighting in Oklahoma. The Justices in Oklahoma are appointed for life, but are

subject to periodic scrutiny through the votes on retention ballots.

The Supreme Court's unanimous rejection of its own Referee's report finding the initiative petition to have sufficient valid signatures, and its subsequent actions, in its adjudication of the constitutionality of the initiative, turned statute, were particularly concerning for the following reasons:

(1) The Referee that the Court appointed to preside over the initiative petition signature challenge is recognized as the foremost authority in Oklahoma on initiative petition signature challenges. He has served as Referee for all the initiative petition signature challenges for the past twenty years. He presided over the month long trial consisting of 89 witnesses resulting in 4,555 pages of transcript and thousands of exhibits. He had never previously had his conclusions on initiative petition signature challenges rejected by the Court.

(2) The initiative petition, according to the evidence, clearly lacked a sufficient number of signatures to be allowed to go to a vote of the people. App. 80.

(3) In order to justify rejecting the Referee's report and find that there were sufficient petition signatures, the Justices unanimously adopted for the first time a *de novo* review standard. App. 95. This new standard mandated that each Justice review the entire record from the hearing before the Referee. The records of the Court Clerk of that Court clearly establish the fact that this could not have and did not occur.

(4) Then, when the Justices rendered their unanimous opinion on November 13, 2002 (App. 95), it shockingly

based its decision on facts that not only were grossly untrue, but were no where found in the trial records from the hearing before the Referee.[1] The Justices created their own facts to justify the court's decision!

(5) Each of the Justices voted to approve the extremely erroneous opinion, strongly indicating that none of them had, in fact, conducted a *de novo* review of the record as the opinion implied and required. Otherwise, surely one of them would have recognized the glaring erroneous factual conclusion based upon the created facts used as a basis to reject the Referee's conclusions.

(6) The author of the Court's opinion, Justice Winchester, is married to a state legislator who had publicly voted against and opposed proposed legislation favorable to the cockfighters.

(7) Because there had to be some explanation for Justice Winchester's grossly erroneously and curious opinion, Petitioners sought a hearing before Justice Winchester as to his apparent conflict of interest. Justice Winchester never granted the request or officially responded to it, but the other Justices of the Court unanimously determined, without any hearing, that there was no reason for Justice Winchester to disqualify. App. 123.

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[1] The Oklahoma Supreme Court, in its November 13, 2001 opinion (App. 95) rejected the cockfighters' voter registration database, finding it to be out of date. The Referee had approved the database which was the official Oklahoma Election Board database for the time period in question. In the Court's critical rejection of the database, it had gotten the dates confused as to the date of the signature circulation period in 1999 and the signature challenge proceeding before the Referee in 2000, an extremely obvious and unexplainable error. App 106. Because the Court rejected the cockfighters' database, it erroneously rejected the merits of the signature challenge.

(8) The Justices on July 2, 2003 then issued another unanimous opinion on the initiative petition signature challenge. App. 109. The official citation number on the erroneous opinion issued on November 13, 2001 was 2001 OK 98. App. 95. The Court assigned this same official number, 2001 OK 98, to its new replacement opinion, thereby making the record appear that the grossly erroneous opinion had never been issued. App. 109. The replacement opinion again rejected the Referee's report, but made no mention of its previous erroneous opinion nor the created facts therein contained. The replacement decision reached the same result as was reached in the first erroneous opinion, but did so by rejecting critical findings in the Referee's Report. It was again, allegedly, a *de novo* opinion, but the Court Clerk's records do not indicate that the individual Justices actually ever reviewed the voluminous record. Again, the record made before the Referee established clearly that the initiative petition lacked sufficient signatures to go to a vote of the people. Yet, because of the Court's unanimous replacement opinion (App. 109) holding otherwise, the measure went to a vote of the people and was approved. The current constitutional challenge would not have occurred but for the Court's unmerited opinion that appeared to have been founded on extra-judicial considerations by the Court other than the evidence that had been considered by the Referee.

(9) The new opinion was clearly erroneous, but it was also unanimous. In an effort to try to determine the real reasons behind the opinion, Petitioners sought a hearing to disqualify the Justices, which was summarily denied. The new opinion remained in place and the initiative was approved by a vote of the electorate.

(10) When the Attorney General sought to have the Oklahoma Supreme Court exercise original jurisdiction over the State District Court proceedings challenging the constitutionality of the adopted anti-cockfighting statute, petitioners felt that the Justices' previous irregular and curious handling of the cockfighting issues mandated concerns over the Justices' ability to provide a fair hearing to petitioners on the new statute's constitutionality in face of all the political and journalistic influences and forces that surrounded the issues. Petitioners sought a hearing on the disqualification of individual Justice's bias and prejudice issues and sought discovery of non-deliberative facts that related directly to those issues. The Court appointed its own Referee, the same one whose conclusions it had previously rejected, to serve as a fact finder in the disqualification hearing. The Court summarily rejected petitioners' discovery request and refused to address any of the bias and prejudice issues.

(11) During the pendency of the disqualification proceeding, an article was published in the social section of *The Sunday Oklahoman*, one of the very large metropolitan newspapers that had boldly and editorially chastised anyone who favored cockfighting. In that article, one of the challenged Justices, Justice Opala, a highly influential and experienced member of the Court, was reported to have been the guest of the newspaper on an overnight centennial junket to Las Vegas, Nevada as one of its "loyal friends." The newspaper's "loyal friends" were treated as royalty during the celebration, being flown there, put up in a luxury Las Vegas hotel on the strip, wined and dined, treated to a special show by a famous Las Vegas performer, and returned by air to Oklahoma City the next day. This "loyal" friendship

obviously did not arise overnight, but was the result of many years of loyalty. Justice Opala, upon being confronted about the news story by petitioners issued his Certificate of Disqualification. App. 125. His statement in his Certificate did not acknowledge any improprieties, but caustically addressed his disqualification from his perspective. He was obviously highly offended that his fitness to serve as a "neutral judge" in the proceeding had been challenged by the cockfighters.

(12) At the hearing before the Referee, none of the remaining challenged Justices appeared. They stonewalled the process. Because they refused to cooperate in the proceeding, it is not known if the other Justices, or how many of them, are also "loyal friends" with the major metropolitan newspapers that exerted so much influence on the cockfighting issue. The Referee, predictably, concluded that there was no justification for the remaining Justices to disqualify. App. 126. This time, the Court agreed with its own Referee's conclusion. App. 134.

(13) With this background, the Court accepted original jurisdiction on the petitioners' constitutional challenge to the cockfighting statute and, as expected, found it to be constitutional. App. 1. Petitioners seek certiorari review by this Court of that decision and on the issue of due process in connection with the entry of that decision.

A. The Oklahoma Supreme Court ignored the clear precedent of the United States Supreme Court, and its own precedent established by applying the holdings of the United States Supreme Court, in its denial of due process of law to petitioners in petitioners' requests to disqualify individual Justices of that Court.

The Oklahoma Supreme Court has addressed the due process issue related to the disqualification of trial judges in the Oklahoma Judicial System. The Court had relied heavily upon U.S. Supreme Court cases in its consideration of the role of a judge in protecting a parties' constitutional rights to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution.

In *Pierce v. Pierce,* 2001 OK 97, 39 P.3d 791, the Oklahoma Supreme Court reversed a trial court decision because the trial judge's political activities created an appearance of impropriety. At paragraph 18 of its opinion, the Court stated:

> Due process jurisprudence includes the concept of the appearance of a fair trial. The High Court has explained that the reach of due process jurisprudence requires not only a fair tribunal, but also the appearance of a fair tribunal. *In re Murchison,* 349 U.S. 133, 136 (1955). Due process "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980), *quoting, Joint Anti-Fascist*

> *Committee v. McGrath,* 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring). That Court has stated that "'justice must satisfy the appearance of justice,' and this 'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,'. . . . " *Marshall,* 446 U.S. at 243, *quoting, Offutt v. United States,* 348 U.S. 11 (1954), and *In re Murchison,* 349 U.S. at 136. *See also, Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971).

The challenged Justices of the Oklahoma Supreme Court have failed to apply the same constitutional due process standards to themselves that they applied to the Oklahoma trial judges. More importantly, their conduct and actions regarding the issues before them do not portray an appearance of a fair tribunal. There can be no fairness assigned to the manner in which the court handled the signature challenge issues that preceded their assuming original jurisdiction of the constitutional challenge to the anti-cockfighting statute that gave rise to its opinion in *Edmondson v. Pearce,* 2004 OK 23, 91 P.3d 605. App. 1. In the signature challenge, the Justices habitually ruled on disqualification issues without allowing any due process hearings. It cannot be presumed that the Justices' apparent bias and prejudice that was evident in the previous cockfighting case had dissipated before they entertained the constitutional issues in *Edmondson v. Pearce,* the subject of this petition.

In *In re Murchison,* 349 U.S. at 136, this Court held that:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of

> cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio,* 273 U.S. 510, 532 (1927).

There was an obvious "probability of unfairness" in the challenged Justices unanimous rejection of the court's own Referee's conclusion through their use of absolutely incorrect facts that had no source in the record. How can eight State Supreme Court Justices all agree on grossly wrong facts if any of them actually reviewed and objectively considered the record made before the Referee in the absence of bias or prejudice? From whence did they derive the non-judicial facts they unanimously inserted in their opinion to reject their own Referee's report and adjudicate that an initiative petition contained sufficient signatures when it obviously did not? See Referee's Corrected Report, App. 80. What motivated them to create their own facts?

The Oklahoma Supreme Court's ruling in *In re Initiative Petition No. 365, State Question No. 187,* 2001 OK 98, 55 P.3d 1048 (App. 109), approving the sufficiency of the signatures on the subject initiative petition is irrelevant to this proceeding as to the merits of that opinion. It is, however, relevant as a backdrop to its ruling in the case at issue, *Edmondson v. Pearce,* 2004 OK 23, 91 P.3d 605, as it

relates to the bias or prejudice of the challenged Justices who unanimously approved the opinion in that case.

Because the Oklahoma Justices stonewalled all efforts of the cockfighters to determine the reasons for their highly irregular adjudications on cockfighting issues and were denied any meaningful hearing on the disqualification issues, it still remains a mystery as to why the Justices were inclined to go to such links to enter unanimous rulings against the cockfighters. It is known that Justice Winchester, the Justice who authored the original grossly erroneous opinion in the cockfighting challenge case was and is married to a state legislator who opposed the cockfighters on legislation before the legislature. It is unknown what, if any, impact Justice Winchester's wife may have had on his attitude or prejudice against the cockfighters. What is known is that the major newspapers, including *The Oklahoman* which serves the legislative district Mrs. Winchester represents, had strongly editorialized against cockfighting in Oklahoma. Justice Winchester's leadership in the Oklahoma Supreme Court that resulted in clearly erroneous decisions can only be perceived objectively to have created an appearance that justice could not have been done.

Following the challenge to Justice Winchester after he had authored the grossly erroneous opinion, all subsequent opinions were issued as *per curiam* opinions, thereby disguising the identity of the author. As a result, it is not known who actually authored all subsequent opinions or how much influence, if any, Justice Winchester had on those subsequent opinions.

This U.S. Supreme Court has considered the due process implications of having at least one prejudicial

State Supreme Court Justice participate in the adjudicating process. In *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813 (1986), the U.S. Supreme Court considered an appeal from the Supreme Court of Alabama wherein one of the participating Justices had a conflict. The Alabama Supreme Court rendered a *per curiam* opinion just as in the case at bar. The U.S. Supreme Court held that the conflicted Justice's participation in the case violated appellant's due process rights to a fair hearing.

The *Aetna Life Insurance Co. v. Lavoie* case was cited and quoted by the U.S. Supreme Court in *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 865 (1988), as follows:

As we held in *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986), this concern has constitutional dimensions. In that case we wrote:

> "We conclude that Justice Embry's participation in this case violated appellant's due process rights as explained in *Tumey, Murchison,* and *Ward*. We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama '"would offer a possible temptation to the average [judge] . . . [to] lead him not to hold the balance nice, clear and true."' *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972). The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."'" *In re Murchison,* 349 U.S. 133, 136.

It is not known from the record what influence the journalistic opposition to the cockfighting issues may have had, but what is known is that one of the senior Justices of the Oklahoma Supreme Court, Justice Opala, is a "loyal friend" to *The Oklahoman*. This fact was publicly recognized by the newspaper in its Sunday social section. Justice Opala's willingness to be entertained by the newspaper on a celebration trip to Las Vegas as a "loyal friend" creates a very serious doubt that his adjudication and influences on the other Justices could "hold the balance nice, clear and true." As a minimum, Justice Opala's conduct and his possible influence on the remaining Justices does not "satisfy the appearance" of justices required by due process standards.

Justice Opala's Certificate of Disqualification (App. 125) states clearly his perception of the cockfighters' expression of concern about his ability to be a neutral arbiter in light of his being a publicly proclaimed "loyal friend" of the highly influential newspaper. He indignantly characterized the challenge to his fitness to serve as a "gladiatorial encounter." He cited *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971), as authority for his disqualification. The citation of *Mayberry* appears to speak loudly about Justice Opala's belligerence towards the cockfighters. *Mayberry* was a criminal case wherein the previously convicted defendant was, indeed, "gladiatorial" towards the trial judge. The cockfighters were never "gladiatorial" towards Justice Opala. They only shed light on the facts related to the concerns of which they had become aware through the newspaper. The viciousness shown by Judge Opala in his Certificate of Disqualification demonstrates a high level of anger indicating that a bias and prejudice nerve was struck which obviously interfered with his

neutrality and magnified the influence that he had on the remaining Justices. Had the article not appeared in the newspaper, his "loyal friend" status would never have surfaced in that proceeding. He had to be forced to reveal his status with that newspaper. More importantly, none of the other Justices ever disclosed any information about their relationship with the newspaper or their knowledge of Justice Opala's relationship.

The actions of the Justices in their refusal to provide a meaningful hearing on the cockfighters' bias and prejudice concerns, coupled with the demeaning manner used by the Justices in refusing to address the concerns, have created an appearance of impropriety that compromises the integrity of all proceedings before that Court. As the highest court in the State of Oklahoma, unless the U.S. Supreme Court is willing to protect citizens from such abuse and overreaching, the due process rights of citizens can be denied with impunity.

B. The Oklahoma Supreme Court ignored clear due process precedents in holding that the Oklahoma Anti-cockfighting Statute, Title 21 O.S. Supp. 2003 §§ 1692.1-1692.9, enacted into law by initiative petition was constitutional.

1. The statute that purports to ban "cockfighting," specifically defines "cockfighting" as "a fight between birds," any birds, which definition is overly broad and vague. App. 3, footnote 1.

Title 21 O.S. 2003, § 1692.1 provides:

As used in this act:

A. "Cockfight" or ""cockfighting" is a fight between birds, . . .

This preamble definition of the statute fails to distinguish between innocent conduct and alleged harmful conduct. A "cockfight" is a "fight between birds," any birds, whether fighting cocks in a cockpit or Bluejays in one's backyard. This overly broad definition must be applied throughout the statute. It is not restricted to fighting cocks, but criminalizes all persons that may be party to observing or encouraging a "fight between birds," even though the process of feeding birds is a normally innocent act, but may lead to a "cockfight" as defined by the statute. *All* birds fight by nature. This is an undisputable fact.

This Oklahoma statute was drafted by radical animal rights people who exacted a constitutional overkill in their pursuit to ban everything associated with cockfighting. The law they drafted burdens the constitutional rights of even those citizens uninvolved in gamecock fighting. It is, as a result, clearly unconstitutional. *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1909) ("If a statute burdens constitutional rights and all that can be said on its behalf is that it is a vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue.")

In *Steinberg v. Carhart*, 530 U.S. 943 (2000), this Court addressed the statutory definition construction issue. At page 2615, this Court stated:

> When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning. *Meese v. Keene,* 481 U.S. 465, 484-485 (1987).

The drafters could have used the dictionary definition of a "cockfight," but they chose not to do so.[2] The statutory definition they used extends to fights of all birds, not just "fighting cocks."

Because of the overbreadth of the statute, the law is extremely vague. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983) (citing Due Process Clause of the Fourteenth Amendment of the United States Constitution). "Where a legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender,* 461 U.S. at 358 (quoting *Smith v. Goguen,* 415 U.S. 566, 575 (1974)). *Kolender* was prominently cited by this Court in *City of Chicago v. Morales,* 527 U.S. 41 (1999), a case that focused upon the overly broad and vague definition of "loitering" used in an anti-loitering ordinance. The overly broad and vague definition used for loitering in that ordinance permeated and controlled the enforcement of the ordinance just as is apparently intended to occur in the enforcement of the anti-cockfighting statute.

In *Morales,* the Illinois Supreme Court had recognized that the term "loiter" may have a common and accepted

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[2] *Black's Law Dictionary* defines "cockfight" as "a contest of gamecocks usually fitted with metal spurs." "Gamecock" is defined as "a male gamefowl." "Gamefowl" is defined as "a domestic fowl of a strain developed for the production of fighting cocks."

meaning, but the definition of that term in the ordinance – "to remain in any place with no apparent purpose," does not. At page 1859, this Court stated:

> Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not. **The Illinois Supreme Court emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm.** (Emphasis added.)

Likewise, one cannot conceive that the drafters of the anti-cockfighting law, or the voters who voted for it, really meant to criminalize each instance that a citizen observes or facilitates any birds to fight through feeding or otherwise, but a clear reading of the law does just that because of its all encompassing definition of cockfighting as "a fight between birds," between any birds. The vagueness of the law is not the product of uncertainty about the normal meaning of cockfighting. Generally, everyone knows what cockfighting means in its normal usage, fights between bred and trained fighting cocks. But, just as the Chicago ordinance assigned an unusual meaning to loitering, the drafters of this law assigned their own unusual meaning to "cockfighting," and in doing so, failed to distinguish between innocent conduct and alleged harmful conduct.

This Court in *Morales*, at page 1859, quoted *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966), "It is established that a law fails to meet the requirements of due process if it is so vague and standardless that it leaves the

public uncertain as to the conduct it prohibits." Because of the vagueness of the anti-cockfighting law, it leaves uncertainties as to what conduct is prohibited. It remains difficult and unreasonable to believe that the drafters intended to make a criminal of the loving grandmothers who enjoy feeding wild birds in their backyards even though the birds they feed often engage in combat over the food given to them. This simple act, by definition, is criminalized under the law, as the kind grandmother's kind actions facilitate fights between birds, a "cockfight" according to the statutory definition. In *Morales,* at page 1860, this Court quoted *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939), "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." This Court in *Morales,* at page 1860, also observed that if a person loitering is, in fact, harmless and innocent, then the possible application of the ordinance to that person is "an unjustified impairment of liberty." Likewise, if engaging in an activity with birds, any birds, even those other than fighting cocks, that may innocently result in a "cockfight" as defined by the law, then the possible application of the law to that person is "an unjustified impairment of liberty." Where law enforcement is left to make the arbitrary choice as to how the law is to be applied, then such law is clearly unconstitutional. Law enforcement must not be allowed unbridled discretion under a law.

This Court, in *Morales,* at page 1861, quoted *Kolender v. Lawson,* 461 U.S. 351, 358, (1983), in holding that the broad sweep of the ordinance violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." This Court commented as to the Chicago loitering ordinance that there were "no such

guidelines." Likewise, there are no such guidelines in the anti-cockfighting law as it applies to all the prohibited activities regarding all birds, not just fighting cocks.

This Court also noted in *Morales,* at page 1861, that the Illinois Supreme Court had correctly interpreted the definition used in the Chicago ordinance to mean that "it provides absolute discretion to police officers to decide what activities constitute loitering." Likewise, because of the overbreadth of the anti-cockfighting law, it leaves law enforcement the absolute discretion to decide what constitutes cockfighting, since it relates to human conduct as to all birds, not just fighting cocks, whether such conduct is innocent or allegedly harmful conduct.

The Oklahoma Supreme Court in *Edmondson v. Pearce,* at ¶ 54 (App. 56), discounts the relevance of *Morales* by attempting to distinguish the problems with the two definitions in question. The Oklahoma Court dismisses *Morales* by conclusively stating:

> Unlike the *Morales* situation, the [Oklahoma anti-cockfighting Act] *clearly and unambiguously* defines the specific conduct of "cockfight" or "cockfighting" which would subject individuals to prosecution. (Emphasis added.)

This is an evasive, erroneous, self-serving, and very misleading conclusion. The statutory definition is "clear and unambiguous." It applies to all birds. When the definition is applied throughout the statute, it creates an unconstitutional result. The opinion totally ignores the concerns over the definition of "cockfighting" in the statute, and erroneously claims that its definition is defined by the specific conduct it criminalizes. That may sound

good, but it craftily circumvents the vagueness issue. The Act criminalizes the following actions:

a. Section 1692.2. " . . . willfully instigates or encourages any cockfight ["fight between birds"]. . . . "

b. Section 1692.3. " . . . keeps any pit or other place . . . to be used in permitting any cockfight ["fight between birds"]. . . . "

c. Section 1692.4. " . . . does any act or performs any service in the furtherance of or to facilitate any cockfight ["fight between birds"]. . . . "

d. Section 1692.6. " . . . knowingly present as a spectator . . . at such cockfight ["fight between birds"]. . . . "

In the normal course of living, any lover of birds is subject to violating these acts on any given day. Innocently feeding of birds "instigates" or "encourages" "fights between birds." Innocently maintaining a backyard is a "place" where "fights between birds" occur. Innocently participating in "any act" or "service" such as feeding birds, any birds, can cause "fights between birds." Observing or being a "spectator" at a "fight between birds" can innocently occur in one's backyard. By the statute's definition, none of the birds have to be fighting cocks to subject citizens to criminal penalties for doing any of the statutorily described acts.

The Oklahoma Supreme Court has clearly erred in its constitutional adjudication of the definition used for cockfighting in the statute. The decision below reflects a serious misapplication of the vagueness doctrine. *Kolender v. Lawson,* 461 U.S. 352, 357 (1983), provides " . . . the doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a

manner that does not encourage arbitrary and discriminatory enforcement."

The vagueness of the specific alleged acts criminalized under the anti-cockfighting statute violates the vagueness doctrine.

In addition to the overbreadth and vagueness of the statutory definition of cockfighting, the other terms used in the statute is likewise violative of the vagueness doctrine. The terms "instigates," "encourages," "facilitate," "performs **any** service" (emphasis added), and "spectator," fail to define specifically any harmful conduct that is not also commonly known to be innocent conduct. These terms fail to meet the requirements of due process because they are so vague and standardless that they leave the public uncertain as to the specific conduct they prohibit. *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966). Citizens of Oklahoma who love birds, any birds, and who enjoy their natural instincts, should not be required to speculate as to how law enforcement may perceive the acts associated with the enjoyment of birds. *Lanzetta v. New Jersey,* 306 U.S. 451 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.") These vague prohibitions are violative of the essential constitutional rights of citizen's under the First, Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

The Oklahoma anti-cockfighting statute is unlike any other anti-cockfighting statute in the United States. It is well established that cockfighting can be legally banned by

states. However, there is a right and wrong way of doing it. The animal rights proponents have presented a measure to Oklahoma that goes well beyond what our constitution allows.

This is a very important constitutional case. It calls into question the constitutional standards that should be applied to the highest court in a state and to statutes that are politically motivated.

The First, Fifth, and Fourteenth Amendments cry out for this Court to grant the writ of certiorari and the Petitioners so request.

Respectfully submitted,

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APPENDIX A

EDMONDSON v. PEARCE
2004 OK 23
91 P.3d 605
Case Number: 98754
Decided: 03/30/2004

THE SUPREME COURT OF THE STATE OF OKLAHOMA

ATTORNEY GENERAL W.A. DREW EDMONDSON, DISTRICT ATTORNEYS VIRGINIA D. SANDERS, JOHN DAVID LUTON, JAMES THORNLEY, RICHARD GRAY, MITCHELL D. SPERRY, ROBERT E. CHRISTIAN, ROBERT C. SCHULTE, EDDIE WYANT and MAX COOK, THE GOVERNOR OF OKLAHOMA and THE OKLAHOMA STATE BUREAU OF INVESTIGATION, Petitioners,

v.

JEFFREY PEARCE, GEORGE DAY, EUGENE EUBANKS, SHERMON COOMBES, ROBERT CRITTENDEN, CLARENCE STOCKTON, TOMMY FANNIN, BRAD WEGER, JIMMY BEAL, CHARLIE WOOLARD, JUDY HAMILTON MERLE E. GREGORY, JEFFERY C. HARRIS, LARRY C. HULL, JIM PARNELL, SAM RYALS, VAL HOLLAND, SAL CORILLO, DAVID BATES, GARY CARTER, J. W. CHADWICK, GARY GILLIAM, MARCI GILLIAM LOUIS CHAFFIN, ALBERT DINK FAIR, JOHNNY BENETT, G.W. POYNER, FRANK STANSBERRY, DALE HILL, DANNY L. MILLER, TILLMAN L. HAMMONDS, TONY JAMES, PAULA DURANT, MERILYNN COGBURN, ROBERT ROEBUCK, JOHN MACK HAMPTON, KELLYVILLE GAME CLUB, an Oklahoma Corp., COLETA SMITH, an Individual, CLAYTON SMITH, an Individual, MARY KNIGHT, JIM TYLER, EARL JONES, WILKIE FLOWERS, JR., T.J. HOGAN, DEBRA E. MCCARTY, ODIS WILLIAMSON,

STEVEN D. TANKERSLEY, BOB MELTON, OLEN WEAVER, BARNEY BARNETT, MEM INCORPORAED, an Oklahoma Corporation d/b/a POULTRY PALACE, LEANNE HORNBACK, KELLY BARGER, BARBARA BRYANT, KEVIN BRYANT, and Others Similarly Situated, Respondents.

APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR DECLARATORY RELIEF.

¶ 0 Petitioners, the Oklahoma Attorney General and Governor, certain district attorneys and the Oklahoma State Bureau of Investigation request this Court to assume original jurisdiction to grant declaratory relief upholding the constitutionality of a statutory scheme (the Act) that outlaws cockfighting and related activities, 21 O.S.Supp.2003, §§ 1692.1-1692.9. The Act passed through initiative by a vote of the electorate at the November 2002 election. Petitioners filed this case after respondents and others (individuals or companies involved in aspects of cockfighting) successfully obtained either temporary restraining orders and/or temporary injunctions against enforcement and/or prosecution under the Act in several State district courts. Respondents ask us to decline the assumption of original jurisdiction and, alternately, should we assume it, to hold the Act unconstitutional based on challenges made by them under multiple provisions of the United States and Oklahoma Constitutions. We assume original jurisdiction and uphold the Act's facial constitutionality over respondents' multiple challenges.

ORIGINAL JURISDICTION ASSUMED; DECLARATORY RELIEF GRANTED.

Sherry A. Todd, Assistant Attorney General, Oklahoma Attorney General's Office, Oklahoma City, Oklahoma, for petitioners.

Larry L. Oliver of Larry L. Oliver & Associates, P.C., Tulsa, Oklahoma, for all respondents except T.J. Hogan and Debra E. McCarty.

Tom C. Lane, Sr. of Tom C. Lane, Sr. & Associates and Gary E. Thompson, Sapulpa, Oklahoma, for respondents, Kellyville Game Club, an Oklahoma corporation, Coleta Smith, an individual and Clayton Smith, an individual.

PER CURIAM:

¶ 1 Petitioners, the Oklahoma Attorney General and Governor, certain district attorneys and the Oklahoma State Bureau of Investigation request us to assume original jurisdiction to grant declaratory relief upholding the constitutionality of 21 O.S.Supp. 2003, § 1692.1 et seq., (the Act) passed by a vote of the electorate via the initiative process at the November 2002 election. Generally, the Act bans cockfighting (as defined) and related activities, outlaws being a knowing spectator at cockfighting events and sets criminal penalties for violating the Act's terms. The Act also contains a forfeiture provision that comes into play following a conviction under certain sections of the Act.[1]

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[1] Title 21 O.S.Supp.2003, §§ 1692.1-1692.9 (the Act), provides:

§ 1692.1:

As used in this act:

A. "Cockfight" or cockfighting" is a fight between birds, whether or not fitted with spurs, knives, or gaffs, and

(Continued on following page)

whether or not bets or wagers are made on the outcome of the fight, and includes any training fight in which birds are intended or encouraged to attack or fight with one another.

B. "Equipment used for training or handling a fighting bird" include knives or gaffs, cages, pens, feeding apparatuses, training pens and other related devices and equipment, and is hereby declared contraband and subject to seizure.

§ 1692.2:

Every person who willfully instigates or encourages any cockfight, upon conviction, shall be guilty of a felony. The penalty for a violation of this section shall be as provided in [§ 1692.8(A)] of this act.

§ 1692.3:

Every person who keeps any pit or other place, or knowingly provides any equipment or facilities to be used in permitting any cockfight, upon conviction, shall be guilty of a felony. The penalty for a violation of this section shall be as provided in [§ 1692.8(A)] of this act.

§ 1692.4:

Every person who does any act or performs any service in the furtherance of or to facilitate any cockfight, upon conviction, shall be guilty of a felony. Such activities and services specifically prohibited by this section include, but are not limited to: promoting or refereeing of birds at a cockfight, advertising a cockfight, or serving as a stakes holder of any money wagered on any cockfight. The penalty for a violation of this section shall be as provided in [§ 1692.8(A)] of this act.

§ 1692.5:

Every person who owns, possesses, keeps, or trains any bird with the intent that such bird shall be engaged in a cockfight, upon conviction, shall be guilty of a felony. The penalty for a violation of this section shall be as provided in [§ 1692.8(A)] of this act.

§ 1692.6:

Every person who is knowingly present as a spectator at any place, building, or other site where preparations are being made for a cockfight with the intent to be present at such

(Continued on following page)

¶ 2 Petitioners initiated this case after respondents and others – individuals and companies involved in aspects of cockfighting – obtained temporary restraining orders (TROs) and/or temporary injunctions against enforcement and/or prosecution under the Act in several State district courts.[2] Respondents ask us to decline assuming original

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preparation or cockfight, or is knowingly present at such cockfight, upon conviction shall be guilty of a misdemeanor.

§ 1692.7:

Following the conviction of a person for [§ 1692.2, § 1692.3, § 1692.4 or § 1692.5] of this act, the court entering the judgment shall order that the birds and knives or gaffs used in violation of this act be forfeited to the state, and may order that any and all equipment described in [§ 1692.1] used in violation of this act be forfeited to the state.

§ 1692.8:

A. Every person who is guilty of a felony under any of the provisions of [§ 1692.2, § 1692.3, § 1692.4 or § 1692.5] of this act shall be punished by imprisonment in the state penitentiary for not less than one (1) year nor more than ten (10) years, or shall be fined not less than Two Thousand Dollars ($2,000.00) nor more than Twenty-five Thousand Dollars ($25,000.00), or by both such fine and imprisonment.

B. Every person who upon conviction is guilty of any of the provisions of [§ 1692.6] of this act shall be punished by imprisonment in the county jail for not more than one (1) year, or shall be fined not more than Five Hundred Dollars ($500.00), or by both such fine and imprisonment.

§ 1692.9:

Nothing in this act shall prohibit any of the following:

A. Hunting birds or fowl in accordance with Oklahoma regulation or statute, including but not limited to the sport of hunting game with trained raptors.

B. Agricultural production of fowl for human consumption.

[2] According to materials in the January 15, 2003 Petitioner's [sic] Appendix to Brief in Support of Application to Assume Original Jurisdiction and Petition for Declaratory Relief, petitions challenging the Act's constitutionality were filed by respondents (or others similarly

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jurisdiction and, alternately, should we assume it, to hold the Act unconstitutional based on challenges raised by them under multiple provisions of the United States and Oklahoma Constitutions. We assume original jurisdiction and uphold the facial constitutionality of the Act over the challenges made by respondents.[3]

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situated) and pending in the following counties when this proceeding was filed: Adair, Atoka, Bryan, Carter, Cherokee, Choctaw, Coal, Comanche, Cotton, Creek, Garvin, Jefferson, Johnston, Logan, Love, Marshall, McClain, McCurtain, McIntosh, Murray, Muskogee, Pawnee, Pushmataha, Sequoyah, Stephens and Wagoner. District attorneys and the Oklahoma State Bureau of Investigation (OSBI) are named as defendants in one or more of the cases, though not all district attorneys so named are parties here. Other defendants include the Sheriffs in the respective counties, but no such Sheriff is a party here. In the Logan County case, the State of Oklahoma ex rel., Frank Keating, former Governor of Oklahoma, is named a defendant, as is A. Dewade Langley, in his official capacity as OSBI Director. Further, though Larry L. Oliver appeared as counsel for all respondents in this case, in February 2003 he filed an amended entry of appearance that, in effect, indicates he appears for all respondents, except T.J. Hogan and Debra E. McCarty (apparently plaintiffs in the Logan County case).

[3] We note, it is unnecessary to refer this matter to a referee of this Court for the taking of testimony or hearing of evidence as we do not deem there to be any controverted question of material fact required to be resolved to enable us to rule on the constitutional challenges as a facial matter. *See* Oklahoma Supreme Court Rule 1.192, 12 O.S.2001, Ch.15, App. 1. We also believe oral argument – not a matter of right in this Court – would not materially assist us in our disposition. *See* Oklahoma Supreme Court Rule 1.191(g), 12 O.S.2001, Ch.15, App. 1. We also note final briefing in this case was concluded in late November 2003.

Prior to the November 2002 election matters involving the initiative petition or the process related to it were before us. *See In re Initiative Petition No. 365,* 2001 OK 98, 55 P.3d 1048; *In re Initiative Petition No. 365,* 2000 OK 85, 14 P.3d 545; *In re Initiative Petition No. 365,* 2000 OK 47, 9 P.3d 78. The constitutional issues now here were not decided at the pre-election stage.

PART I. THE DISTRICT COURT ACTIONS AND RESPONDENTS' GENERAL CONSTITUTIONAL CHALLENGES.

¶ 3 Although we have not been provided all trial court petitions filed in the district court cases, we have before us the trial court petition filed in McCurtain County. That case was filed by eight plaintiffs, who are also respondents here.[4] Based on review of materials submitted by both petitioners and respondents, we understand the allegations and arguments made in McCurtain County are representative of the allegations and arguments made by respondents in the other district court cases.[5]

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[4] The November 2002 McCurtain County petition is contained in petitioners' January 2003 appendix. The plaintiffs in the McCurtain County case are respondents, G.W. Poyner, Frank Stansberry, Dale Hill, Danny L. Miller, Tilman L. Hammonds, Tony James, Paula Durant, Merilynn Cogburn and others similarly situated. Mr. Hill is named as Stephen Dale Hill in the McCurtain County case petition caption rather than as Dale Hill, the name appearing in the caption of petitioners' January 15, 2003 Application to Assume Original Jurisdiction and Petition for Declaratory Relief in the instant case. Also, Mr. Hammonds' first name is spelled Tilman in the McCurtain County caption, but Tillman in the caption of petitioners' January 2003 Application, etc. We assume the Mr. Hill and Mr. Hammonds named in the McCurtain County case are the same as those named as respondents in this case. These minor discrepancies (or similar ones) are not pertinent to our disposition here.

[5] Respondents have incorporated in support of their constitutional challenges a November 8, 2002 brief (Plaintiffs' Preliminary Brief in Support of their Challenge to the Constitutionality of State Question 687 to Ban "Cockfighting" in Oklahoma as Approved by the Electorate) filed by plaintiffs in the McCurtain county case. See pp. 2-3 of October 20, 2003 Respondents' Response Brief to Petitioners' Brief in Support of Application to Assume Original Jurisdiction and Petition for Declaratory Relief. This November 2002 brief is contained in petitioners' January 2003 appendix. Respondents also inform at pg. 2 of their October 2003 Respondents' Response Brief, etc. that the petitions filed

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¶ 4 In the McCurtain County case, five plaintiffs allege involvement in the sport of cockfighting for many years and that they are subject to being prosecuted under the Act for their associations and actions in the cockfighting business. Another plaintiff is described in the petition as a long time cockfighter involved in all aspects of the industry and that he is also subject to being prosecuted under the Act. A seventh plaintiff is alleged to enjoy watching birds fight in his backyard and at cockfighting derbies and that his activities will subject him to criminal prosecution under the Act. The eighth plaintiff alleges: involvement in the sport of cockfighting for many years as a breeder and grower selling game fowl in the international market; he does not compete in fighting cocks; he stands to lose two hundred fifty thousand dollars ($250,000.00), including his farm if the law is enforced; and that he is subject to prosecution under the Act for his associations and actions in the cockfighting business.

¶ 5 The McCurtain County petition also alleges that prior to passage of the Act cockfighting was legal in Oklahoma and that there were over fifty thousand (50,000) citizens like plaintiffs directly involved in cockfighting as breeders, owners, participants, spectators or as suppliers of feed and cockfighting-related products, who stand to sustain substantial damage by virtue of the Act becoming law. The petition also alleges cockfighting in Oklahoma is a major sporting industry with an estimated investment in the State in excess of one hundred million dollars ($100,000,000.00), there are an estimated five hundred thousand (500,000) game fowl in the State

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in the various district court cases are essentially the same as the one filed in McCurtain County.

involved in the cockfighting industry and that major breeders of game fowl in Oklahoma have historically marketed their game fowl throughout the State, the United States and internationally. The petition also alleges the Act provides for no grace period for persons owning game fowl to protect their investment.[6]

¶ 6 The petition further, in effect, alleges the Act's terms, if enforced 1) constitute a deprivation of private property for public use without just compensation; 2) unconstitutionally impinge upon or impair the obligation of contracts, which one or more of the plaintiffs or others similarly situated are parties to, including contracts to sell birds to be used in cockfighting, contracts legal when made but which cannot legally be performed without violating the Act's terms; and 3) unconstitutionally infringe upon free speech and associational rights. In either the McCurtain County petition, a brief filed in that case or in briefs or submissions in this case, respondents attack the constitutionality of the Act under: U.S.CONST. art. I, § 10 (impairment of obligation of contracts); U.S.CONST. amend. I (First Amendment – speech, associational or assemblage rights); U.S.CONST. amend. V (Fifth Amendment – taking of private property for public use without just compensation); U.S.CONST. amend. XIV, § 1 (Fourteenth Amendment – vague and overbroad provisions violating liberty and property rights without due process); and as violative of the fundamental right to travel. The Act is also attacked under: OKLA.CONST. art. 2, § 2 (unconstitutionally denies inherent rights to life, liberty, the

[6] WEBSTER'S NEW COLLEGIATE DICTIONARY, 467 (1979) defines game fowl as, "a domestic fowl of a strain developed for the production of fighting cocks" and gamecock as, "a male game fowl."

pursuit of happiness and the enjoyment of the gains of their own industry); OKLA.CONST. art. 2, § 3 (right of assembly); OKLA.CONST. art. 2, § 7 (deprivation of liberty or property without due process); OKLA.CONST. art. 2, § 15 (impairment of obligation of contracts); OKLA.CONST. art. 2, § 22 (free speech rights); OKLA.CONST. art. 2, § 24 (taking or damaging private property for public use without just compensation); and, finally, OKLA.CONST. art. 5, § 57 (the Act unconstitutionally concerns multiple subjects not clearly expressed in the ballot title voted on by the electorate).[7]

¶ 7 We have also been provided with the Order Granting Temporary Injunction entered by the trial judge in the McCurtain County case, as consolidated with cases in Choctaw and Pushmataha Counties.[8] The Order basically sets forth that testimony was presented by the plaintiffs at a hearing there to the effect that gamecocks are good for only one purpose, i.e., fighting each other, that these birds are not suitable for consumption or any other purpose and because there is no market for them, other than for fighting, their owners will be forced to destroy them or, if said birds are not destroyed, their owners will be subject to

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[7] The McCurtain County petition also cites OKLA.CONST. art. 2, § 9, which provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." The briefs before us from respondents contain neither argument nor authority supporting a violation of this constitutional provision and we decline to consider it here. *See Anderson v. Dyco Petroleum Corp.*, 1989 OK 132, 782 P.2d 1367, 1379 (issues not supported by argument and authority are waived).

[8] The Order Granting Temporary Injunction is contained in respondents' October 20, 2003 Appendix to Response Brief to Petitioners' Brief in Support of Application to Assume Original Jurisdiction and Petition for Declaratory Relief.

criminal prosecution under the Act. The trial judge, apparently relying on this testimony, actually concluded in the Order Granting Temporary Injunction that the State is, in effect, forcing them to destroy their birds, cockfighting equipment and other property.[9]

¶ 8 The Order Granting Temporary Injunction also indicates that evidence was presented indicating there are seven thousand (7,000) Oklahoma members of the Game Fowl Breeders Association; that some breeders have

[9] We must note here that neither the State nor any provision of the Act forces respondents or others similarly situated to destroy any property or equipment, nor do any of the Act's provisions subject one to criminal prosecution if he/she does not destroy such property. The Act, although it does outlaw possession of birds with the intent to fight them and prohibits the use of certain equipment in conjunction with cockfighting, nowhere outlaws the mere possession of any property or requires the destruction of any birds or property. Any destruction of avian creatures, or property related to them, is respondents' choice. However, we deem it advisable to note, should respondents or others similarly situated make a choice to destroy their game fowl or gamecocks, we assume any destruction will be carried out in a humane manner and in a way that does not violate any law of the State of Oklahoma or of the United States. We also deem it worth noting that case law seems to have recognized that rather than being only useful for fighting purposes, gamecocks have also been used for show at competitions based on appearance. *See e.g., Commonwealth v. Balog,* 448 Pa.Super. 480, 672 A.2d 319 (1996), *cert. denied,* 519 U.S. 1129 (1997); *Hogan v. Gridelli,* 129 Or. App. 539, 879 P.2d 896 (1994). We finally note that as to property which apparently has been used by respondents in relation to gamecocks or game fowl in the role of fighting or breeding for fighting, respondents themselves admit that, at least, some of said property has multiple uses, some of which have nothing to do with the fighting of gamecocks. See pg. 8, numbered ¶ 41(a) of McCurtain County petition, attached to petitioners' January 2003 appendix and pg. 11 of Supplement to Respondents' Response Brief to Petitioners' Brief in Support of Application to Assume Original Jurisdiction and Petition for Declaratory Relief filed with this Court on November 6, 2003.

contracts for the sale of their birds, including futures *contracts;* gamecock operations range from three hundred (300) to seven hundred (700) birds with values ranging from seventy-five thousand dollars ($75,000.00) to one hundred thousand dollars ($100,000.00); and that some gamecock operations have mortgages under which the birds are considered net assets and pledged as collateral. The Order Granting Temporary Injunction further sets forth that none of the testimony offered by plaintiffs was challenged by the defendants there and defendants, who were represented either by an Assistant Attorney General or the local District Attorney, offered no witnesses.

¶ 9 With these matters understood, we turn to the issues of the propriety of assuming original jurisdiction and then to the constitutional challenges to the Act.

PART II. PROPRIETY OF ASSUMING ORIGINAL JURISDICTION.

¶ 10 When a matter involves a controversy over which both this Court and the district courts have concurrent jurisdiction (as here), the determination whether to assume original jurisdiction in a particular case is discretionary with this Court. *See Keating v. Johnson,* 1996 OK 61, 918 P.2d 51, 55. Also, we have recognized that the framers of the Oklahoma Constitution intended this Court primarily as an appellate court. *Id.* at 56; *Jarman v. Mason,* 1924 OK 722, 229 P. 459, 464. It was stated in *Kitchens v. McGowen,* 1972 OK 140, 503 P.2d 218, *Syllabus by the Court:*

> The original jurisdiction of the Supreme Court, when concurrent with that of the district court, is intended primarily as a 'stand by' service which it will exercise only when, from the exigencies of

> the case, great injury will be done by its refusal so to do. A different rule would so flood this court with original actions as to destroy its efficiency as an appellate court.

¶ 11 Two central themes run through most of our cases where original jurisdiction has been assumed in the context of concurrent district court jurisdiction. *Keating,* 918 P.2d at 55. One, the matter must concern the public interest, i.e., the case is *publici juris* in nature, which essentially means affecting the people or community at large. *Id.* Two, there must be some urgency or pressing need for an early decision. *Id.* Also, it is the **rare** case that will be entertained on original jurisdiction that requests declaratory relief. *Keating,* 918 P.2d at 57; *Ethics Commission v. Cullison,* 1993 OK 37, 850 P.2d 1069, 1072. Here, petitioners request such relief in the form of a declaration of the Act's constitutionality.

¶ 12 There appears little question the matter is *publici juris* in nature, dealing as it does with the constitutionality of an Act banning cockfighting and related activities that was recently passed through the initiative process by a statewide vote of Oklahoma's electorate. The first prong of the *Keating* test for this Court assuming original jurisdiction is met. The second prong, immediacy, is admittedly more problematic and difficult to detect. However, we believe there is a pressing need to rule on the matter at the present time in view of the nature of the controversy before us and, thus, we exercise our discretionary authority to assume original jurisdiction to rule on the constitutional challenges raised by respondents.

¶ 13 In that numerous district courts have enjoined enforcement of the Act (either by TROs or temporary injunctions) in over twenty-five (25) counties and there

was a lack of equitable authority to do so, assumption of original jurisdiction is necessary to advise the district courts as to the propriety of enjoining enforcement of a criminal enactment in the exercise of their equitable power. Secondly, but relatedly, respondents' challenges to the Act, as a facial matter, are unavailing and without merit because no legitimate property right of theirs has been unconstitutionally impinged upon or taken, nor has any fundamental right of theirs been violated by the Act under review.

¶ 14 The parameters for enjoining enforcement or prosecution under a criminal statute were set forth in *Anderson v. Trimble,* 1974 OK 2, 519 P.2d 1352, *cert. denied,* 419 U.S. 995 (1974), as well as numerous other cases. The general rule as to when it is appropriate for a civil court in an equity proceeding to enjoin prosecution or enforcement under a criminal statute or municipal ordinance, is as follows: 1) the statute or ordinance is void or unconstitutional; 2) if a criminal proceeding is allowed to proceed property rights would be destroyed; and 3) irreparable injury would be inflicted without an injunction. *See e.g., Whitson v. City of Cherokee,* 1935 OK 650, 46 P.2d 907; *Allen v. Oklahoma City,* 1935 OK 1143, 52 P.2d 1054; *Oklahoma City v. Norton-Johnson Buick Motor Co.,* 1934 OK 425, 36 P.2d 278; *City of Blackwell v. Griffith Amusement Co.,* 1932 OK 320, 16 P.2d 233; *see also Dobbins v. City of Los Angeles,* 195 U.S. 223 (1904) (criminal proceedings may be enjoined when arbitrary and discriminatory exercise of police power under Fourteenth Amendment equal protection analysis, if property rights will be destroyed by enforcement of law or ordinance). All three prerequisites must coincide for an injunction to be appropriate. *See Whitson,* 46 P.2d at 908;

State ex rel. Hensley v. Eubanks, 1962 OK CR 2, 368 P.2d 253, 255.

¶ 15 One of the main reasons for the restrictive rule as to when it is appropriate for equity to enjoin pending or threatened prosecution under a criminal statute is based on the separation of powers doctrine, i.e., the judiciary should be reluctant to unnecessarily interfere in the workings of the other two branches of government, the executive and legislative, in the exercise of their authority/power. *See Rathke v. MacFarlane,* 648 P.2d 648, 651-652 (Colo.1982). Before a court may enjoin the enforcement of a criminal statute, exceptional circumstances must be shown. *Id.* at 653. Injunctive relief must be necessary to protect existing legitimate property rights or fundamental constitutional rights. *Id.* As noted above, the Act under consideration does not unconstitutionally impinge on legitimate/recognized property interests or violate any fundamental right of respondents.[10]

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[10] *Anderson v. Trimble,* 1974 OK 2, 519 P.2d 1352, *cert. denied,* 419 U.S. 995 (1974), seems to limit equitable power to enjoin enforcement of a penal/criminal statute to only those situations where property rights are involved, as opposed to those involving the prevention of injuries to personal rights. The Colorado Supreme Court in the case of *Rathke v. MacFarlane,* 648 P.2d 648, 652-653 and n. 5 (Colo.1982), recognized that in some situations the protection of fundamental rights (e.g., speech or religion) may also appropriately call into play the equitable authority of a court to enjoin enforcement of a criminal enactment when repeated arrests and prosecutions violative of such rights are implicated. Even if we assume here that in certain circumstances impingement upon such fundamental rights would be sufficient for invocation of equitable cognizance, the Act under review, as a facial matter, does not unconstitutionally impinge on such rights so as to require equitable interference with the workings of the criminal law.

¶ 16 The immediacy or pressing need prong of the two-part test for deciding whether original jurisdiction should be assumed is satisfied because, in effect, the TROs and/or temporary injunctions, have made it impossible for law enforcement officials in over twenty-five (25) counties to carry out their duties under the Act, even though no valid basis has been espoused by respondents to enjoin enforcement or prosecution under the Act. Without involvement of this Court to remedy this frustration of a valid criminal enactment, the present state of affairs may be allowed to continue for a lengthy period of time, even though no valid equitable basis has been put forward by respondents to thwart enforcement of the Act. We, thus, believe the instant situation involves one of those rare circumstances appropriate for the assumption of original jurisdiction to grant declaratory relief.

PART III. GENERAL STANDARD OF REVIEW – CONSTITUTIONALITY OF STATUTE.

¶ 17 The general rules concerning the standard of review applicable when a statutory enactment is attacked on constitutional grounds were spelled out in *Fent v. Oklahoma Capitol Improvement Authority,* 1999 OK 64, ¶¶ 3-4, 984 P.2d 200, 204, *cert denied,* 528 U.S. 1021 (1999). In *Fent,* this Court said:

> In considering a statute's constitutionality, courts are guided by well established principles. A heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality and every presumption is to be indulged in favor of the constitutionality of a statute. If two possible interpretations of a statute are possible, only one of which would render it unconstitutional, a

> court is bound to give the statute an interpretation that will render it constitutional, unless constitutional infirmity is shown beyond a reasonable doubt. A court is bound to accept an interpretation that avoids constitutional doubt as to the legality of a legislative enactment.
>
> It is also firmly recognized that it is not the place of this Court, or any court, to concern itself with a statute's propriety, desirability, wisdom, or its practicality as a working proposition. [T]he judiciary cannot challenge the wisdom, need or desirability of any constitutionally valid legislation. Such questions are plainly and definitely established by our fundamental law as functions of the legislative branch of government. Respect for the integrity of our tripartite scheme for distribution of governmental powers commands that the judiciary abstain from intrusion into legislative policymaking. A court's function, when the constitutionality of a statute is put at issue, is limited to a determination of the validity or invalidity of the legislative provision and a court's function extends no farther in our system of government.

Id. (citations omitted). That the Act under review was promulgated by the people via the initiative process in the exercise of their retained legislative power (rather than by the Legislature) makes the above-delineated tenets no less applicable. In other words, a statutory enactment passed by the people through the initiative is entitled to the same presumption of constitutionality as one passed by the Legislature.[11] With this general review standard in mind,

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[11] OKLA.CONST. art. 5, § 1 provides as follows concerning the legislative authority of the State and the power of Oklahoma's citizenry to enact legislation independent of the Legislature:

(Continued on following page)

we now turn to consider respondents' particularized constitutional challenges.

PART IV. THE ACT DOES NOT TAKE OR DAMAGE PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION.

¶ 18 In essence, respondents argue that the terms of the Act, i.e., prohibiting the use of birds (including gamecocks) for fighting purposes, constitute a regulatory taking or damaging of their property for public use without just compensation.[12] Respondents' argument in such regard (as with their assertions concerning impairment of contracts and their inherent rights to life, liberty, the pursuit of happiness and to the enjoyment of the gains of their own industry), present a classic example of the tension between the freedom of an individual to do as he/she will with his/her property and the interest of society or the community at large, acting through the legislative process (here by initiative), to place reasonable restrictions on the use of

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> The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; **but the people reserve to themselves the power to propose laws** and amendments to the Constitution **and to enact or reject the same at the polls independent of the Legislature**, and also reserve power at their own option to approve or reject at the polls any act of the Legislature. (emphasis added).

[12] U.S.CONST. amend. V (Fifth Amendment) provides in pertinent part, "nor shall private property be taken for public use, without just compensation." This restriction is applied to the States through the Fourteenth Amendment to the United States Constitution. *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470, n. 10 (1987). OKLA.CONST. art. 2, § 24 provides in relevant part, "[p]rivate property shall not be taken or damaged for public use without just compensation."

property to promote or protect the public good by the passage of laws. In the circumstances of this case, the interests of society and the community at large prevail.[13]

¶ 19 Although respondents seem to assume using birds for fighting is a cognizable or recognized property right or interest subject to protection under takings analysis, something we deem questionable, even if we assume the use of birds for such a purpose was considered a recognized property interest prior to passage of the Act, the outlawing of that one use does not constitute a regulatory taking or damaging of property for which compensation must be paid.[14] Instead, the prohibition against using birds

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[13] We deem it unnecessary in this case's context to exhaustively consider the seizure or forfeiture provisions of the Act. Although there may be some valid constitutional challenge in the application of a particular seizure as it relates to a criminal prosecution or a specific forfeiture after conviction (e.g., a procedural due process challenge), the seizure and forfeiture provisions of the Act, as a facial matter, do not constitute a forbidden taking or damaging of private property without just compensation. In the first place, the forfeiture provisions, under the express terms of § 1692.7 of the Act, do not come into play until there has been a conviction under some part of the Act. Second, as to the contraband and seizure provisions of § 1692.1(B), we have no doubt, the intent was that seizure of cockfighting-related equipment is only allowed consistent with the dictates of the search and seizure provisions of the United States and Oklahoma Constitutions, U.S.CONST. amend. IV (Fourth Amendment – as incorporated against the States through the Fourteenth Amendment), OKLA.CONST. art. 2, § 30 and pertinent State statutes concerning issuance of warrants and seizure of property. *See e.g.*, 22 O.S.2001, § 1221 et seq.

[14] We deem questionable respondents' apparent position that using birds for cockfighting, prior to passage of the Act, was a cognizable or recognized property right or interest subject to protection under takings analysis based on the following rationale. In a case such as this where an individual or company claims that a government regulation constitutes a taking of private property for public use without just compensation, a court's first task is to evaluate whether the claimant has established a property interest for purposes of the Fifth Amendment

(Continued on following page)

for fighting purposes is a reasonable and proper exercise of the police power by the electorate acting in its legislative capacity to promote public morals and to ban an activity

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[*Conti v. United States,* 291 F.3d 1334, 1339 (Fed.Cir.2002), *cert. denied,* 537 U.S. 1112 (2003)] and (as in the instant case) for purposes of OKLA.CONST. art. 2, § 24. If the claimant fails initially to demonstrate that the interest allegedly taken constitutes a recognized property interest, a court need not even consider whether the government regulation is a taking at all. *See Conti,* 291 F.3d at 1339. Respondents' argument in this case impliedly, if not expressly, posits that because it was lawful prior to passage of the Act to use or sell birds for cockfighting purposes, that such use constitutes a property interest subject to constitutional protection. Although we agree such was lawful, we do not necessarily agree that using birds to fight could ever have been said to be recognized as an identifiable property interest subject to protection under the pertinent United States and Oklahoma constitutional provisions.

Criminal statutes prohibiting cruelty to animals or instigating fights between animals have been part of Oklahoma law since at least the early 20th Century. *See Maloney v. State,* 1975 OK CR 22, 532 P.2d 78; Rev. Laws Okla. 1910, § 2746 (cruelty to animals); Rev. Laws Okla.1910, §§ 2743-2744 (instigating fights between animals; keeping place for fighting animals). Although in *Lock v. Falkenstine,* 1963 OK CR 32, 380 P.2d 278, the Oklahoma Court of Criminal Appeals held the criminal statute prohibiting the instigation of animal fighting inapplicable to the fighting of gamecocks because that court held gamecocks were not animals within the contemplation of the statute, the Court of Criminal Appeals left open the possibility of future prohibition by legislative action. *Id.* at 284. In other words, a prohibition on cruelty to animals generally has long been part of our State's history and about forty (40) years ago our own Court of Criminal Appeals foreshadowed the potential for specifically outlawing cockfighting. Thus, regulation of this type, which the Act has now conclusively extended to birds, has long been recognized as the type of law, passed either by the Legislature or the people through the initiative, which would be understood as a valid police power regulation, notwithstanding its technical previous legality. Although we need not definitively decide the issue for purposes of our disposition of this case, we have serious doubts as to whether – given this historical Oklahoma perspective – the use of birds for fighting, could ever be considered an identifiable property interest subject to protection under the United States or Oklahoma Constitutions, in regard to the taking or damaging of property.

deemed injurious thereto, rather than a regulatory taking for which compensation must be paid. At a minimum, the Act serves the significant and legitimate public purpose of preventing cruelty to animals and prohibiting human involvement in bird fighting, obviously out of compassion for avian creatures.[15]

¶ 20 In *Mugler v. Kansas,* 123 U.S. 623, 668-669 (1887), the United States Supreme Court stated:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his

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[15] In the Order Granting Temporary Injunction issued in the McCurtain County case it is indicated that the parties, in essence, agreed that the purpose and intent behind the law was preventing cruelty to the avian creatures covered by the Act. We must also note, however, although not a taking case, the United States Supreme Court in *Paris Adult Theatre v. Slaton,* 413 U.S. 49, n. 15 (1973), quoting from On the Democratic Idea in America 33 (1972), appeared to recognize that statutes prohibiting cockfighting (and other like activities) have been promulgated for at least two purposes, 1) the prevention of cruelty to animals out of compassion for the animals and 2) because such activities have a debasing and brutalizing effect upon the citizenry witnessing such spectacles. A second purpose in addition to the prevention of animal cruelty has, thus, seemed to have been recognized for quite some time: to wit, safeguarding the public welfare by protecting our populace against the debasing and brutalizing effects upon those who witness such events. In any event, we need not rely on this other purpose to support our determination that the Act is facially constitutional. We also note petitioners here have not relied on this other purpose to support their arguments in favor of the constitutionality of the Act as a police power regulation.

> right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

At the outset we acknowledge that takings analysis has undergone change and refinement since *Mugler* was decided. The *Mugler* decision preceded *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), the Supreme Court case generally thought to have given birth to the field of "regulatory takings" jurisprudence. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014-1015 (1992). Before *Pennsylvania Coal Co.,* it was generally thought the Takings Clause only reached a direct appropriation of property or a practical ouster of the owner's possession. *Lucas,* 505 U.S. at 1014. Plainly, *Pennsylvania Coal Co.* ushered in a new era recognizing there are limits to the exercise of the police power in regard to the regulation of property and that "if regulation goes too far it will be recognized as a

taking." *Id.*, 260 U.S. at 415. Notwithstanding the changes and refinement in takings jurisprudence, it was made clear in *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470, 488-492 (1987), that the basic thought expressed in *Mugler* is still sound and we are convinced that case and more recent Supreme Court jurisprudence clearly supports the determination that the Act before us for review withstands respondents' takings challenge.

¶ 21 To uphold the Act over respondents' takings challenge does not require us to express our condemnation of the activity of cockfighting. That is not our responsibility, but the responsibility of the electorate, which passed the Act in its legislative capacity. Our responsibility is only to gauge the legislation for constitutional flaw or infirmity and it is plain to us the Act passes constitutional muster as a reasonable exercise of the police power. This is so, notwithstanding that the Act may have the effect of substantially reducing the value of game fowl or gamecocks or the value of certain property used in cockfighting, or that it may have the effect of prohibiting the most beneficial use (from an economic standpoint) of such property. *See Andrus v. Allard,* 444 U.S. 51 (1979).

¶ 22 In *Andrus* the Supreme Court grappled with whether certain federal enactments authorizing the prohibition of commercial transactions in pre-existing avian artifacts violated the Fifth Amendment property rights of owners of such artifacts because the prohibition wholly deprived them of the opportunity to earn a profit from the relics. *Id.* at 64. In ruling against them, *Andrus* stated:

> Suffice it to say that government regulation – by definition – involves the adjustment of rights for the public good. Often this adjustment curtails

some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922); *see Penn Central, supra,* 438 U.S., at 124, 98 S.Ct., at 2659.

The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of "'justice and fairness.'" *Ibid.;* 98 S.Ct., at 2659; *see Goldblatt v. Hempstead,* 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. *See Penn Central, supra,* 438 U.S., at 123-128, 98 S.Ct., at 2659-2662. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. *Compare Penn Central, supra,* at 130-131, 98 S.Ct., at 2662-2663 and *United States v. Twin City Power Co.,*

350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240 (1956), with *Pennsylvania Coal Co. v. Mahon, supra,* and *United States v. Virginia Electric & Power Co.,* 365 U.S. 624, 81 S.Ct. 784, 5 L.Ed.2d 838 (1961). *See also* Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1230-1233 (1967). In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. *Compare Goldblatt v. Hempstead, supra,* 369 U.S., at 594, 82 S.Ct., at 990, and *Hadacheck v. Sebastian,* 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915), with *Pennsylvania Coal Co. v. Mahon, supra.* In the instant case, it is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge. At any rate, loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests. *Cf., e.g.,* Fuller & Perdue, The Reliance Interest in Contract Damages (pt. 1), 46 Yale L.J. 52 (1936).

> Regulations that bar trade in certain goods have been upheld against claims of unconstitutional taking. For example, the Court has sustained regulations prohibiting the sale of alcoholic beverages despite the fact that individuals were left with previously acquired stocks. *Everard's Breweries v. Day,* 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174 (1924), involved a federal statute that forbade the sale of liquors manufactured before passage of the statute. The claim of a taking in violation of the Fifth Amendment was tersely rejected. *Id.,* at 563, 44 S.Ct., at 633. Similarly, in *Jacob Ruppert, Inc. v. Caffey,* 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260 (1920), a federal law that extended a domestic sales ban from intoxicating to nonintoxicating alcoholic beverages "on hand at the time of the passage of the act," *id.,* at 302, 40 S.Ct., at 150, was upheld. Mr. Justice Brandeis dismissed the takings challenge, stating that "there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use." *Id.,* at 303, 40 S.Ct., at 151. *See Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887).
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> It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure "the advantage of living and doing business in a civilized community." *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S., at 422, 43 S.Ct., at 163 (Brandeis, J., dissenting). We hold that the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment.

Andrus, 444 U.S. at 65-68 (footnotes omitted).

¶ 23 As the Supreme Court recognized in *Lucas,* 505 U.S. at 1027-1028 (a case involving land use regulation), a distinction exists between personal and real property for takings analysis.[16] There it was said, "[a]nd in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a person] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." *Id.,* citing *Andrus,* 444 U.S. at 66-67.

¶ 24 Here we have a regulation of personal property that prohibits one use thereof. Respondents or others similarly situated retain the rights to possess, sell, trade, donate, devise or use their gamecocks or game fowl, or any property related thereto, in any lawful manner or for any lawful purpose. Although their ability or opportunity to earn future profit from fighting such birds or raising or selling them for fighting may be eliminated, that is a "slender reed" upon which to base a takings claim, given their retention of full rights to use or sell their birds for other purposes. Although there was apparently evidence presented by plaintiffs in the McCurtain County case that there is no market for gamecocks and game fowl if the prohibition against fighting is upheld, given the above jurisprudence and in light of the application of judgment, logic and fairness, we do not believe

[16] We do not deem respondents to be arguing the Act prohibiting cockfighting unconstitutionally takes or damages any land owned by them without just compensation in violation of the United States or Oklahoma Constitutions, even though it has been alleged by one plaintiff in the McCurtain County case that he stands to lose his farm if the prohibition is enforced. Accordingly, we need not delve into such an issue.

the prohibition at issue here can rightfully be considered a taking or damaging of property for public use for which compensation is due.[17] Instead, the Act under review represents a non-compensable and valid exercise of the police power to outlaw one use of property which amounts to animal cruelty. We reject respondents' takings challenge to the Act.

PART V. THE ACT DOES NOT UNCONSTITUTIONALLY IMPAIR THE OBLIGATION OF CONTRACTS.

¶ 25 Respondents also assert the Act violates the Contract Clauses of both the United States and Oklahoma Constitutions because contracts entered into prior to its passage cannot now be legally performed.[18] They give as

[17] Although we are not in a position to know the absolute truthfulness of respondents' contention that there is no market for their game fowl or gamecocks other than for fighting or fighting related purposes, as we set out in *supra* note 9, it appears to have been recognized in jurisprudence that gamecocks also have been used for show at competitions based on appearance. *See e.g., Commonwealth v. Balog, supra* note 9; *Hogan v. Gridelli, supra* note 9. Furthermore, as we also mentioned in *supra* note 9, respondents themselves admit that, at least, some of their property has multiple uses. Obviously, cages or pens used in conjunction with cockfighting are examples of property having multiple uses. We also note that respondents' assertion the Act provides no grace period for those owning game fowl to protect their investment, in our view, does not render the Act unconstitutional under the Takings Clauses of either the United States or Oklahoma Constitutions nor any other constitutional provision relied on by them to support their arguments of constitutional infirmity. No case cited by them persuasively supports constitutional invalidity in such regard nor have we found any case that does so.

[18] U.S.CONST. art. I, § 10, cl. 1 provides in pertinent part, "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." The Oklahoma contract clause is found at OKLA.CONST.

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one example, individuals having contracts to sell certain birds that will eventually be used for cockfighting. Respondents misinterpret the scope and sweep of the two Contract Clauses and it is plain the Act's provisions do not unconstitutionally impair the obligation of contracts as alleged by respondents.

¶ 26 It is well settled that the federal Contract Clause concerning no State passing any law impairing the obligation of contracts, is **not** to be read or understood literally. *Keystone Bituminous Coal Association v. DeBenedictis, supra,* 480 U.S. at 502. Although the clause's language is facially absolute, its prohibition must be accommodated to the inherent police power of the state to safeguard the vital interests of the people. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410 (1983). The clause had as its primary focus legislation designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy. *Keystone Bituminous Coal Association,* 480 U.S. at 502-503. The Supreme Court has stated concerning the federal Contract Clause:

> [I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into

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art. 2, § 15 and provides: "[n]o . . . law impairing the obligation of contracts, shall ever be passed."

> between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.' *Manigault v. Springs,* 199 U.S. 473, 480, 26 S.Ct. 127, 130, 50 L.Ed. 274. As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Co. v. McCarter,* 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.'

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241-242 (1978).

¶ 27 In other words, the substance of the above quote is the long-held understanding that not every impairment of a contractual right is unconstitutional under the Contract Clause. In fact, the Supreme Court has recognized that, "[s]tates must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements." *United States Trust Co. v. New Jersey,* 431 U.S. 1, 22 (1977). In *Manigault v. Springs,* 199 U.S. 473 (1905), the Supreme Court provided examples of contracts that must appropriately yield to the police power in the form of laws intended for the public good and welfare. It said:

> [C]ontracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery . . . are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.

Id. at 480.

¶ 28 Although police power regulation which detrimentally acts on contracts is certainly subject to limitation (*Adolph Coors Co. v. Oklahoma Alcoholic Beverage Control Board,* 1978 OK 119, 584 P.2d 717, 719), this Court has also recognized that the right of the legislative branch to act under the police power is part of the existing law at the time of the execution of every contract, and as such becomes in contemplation of law a part of the contract. *State ex rel. Roth v. Waterfield,* 1933 OK 546, 29 P.2d 24, *Third Syllabus.* Simply put, an individual or company by entering into a contract reaching into the future concerning an activity lawful when the contract was made, may not foreclose the Legislature (or the people acting in their legislative capacity) from prohibiting the activity under a reasonable exercise of the police power for the public good. We believe the Act is such a reasonable police power regulation.

¶ 29 A three-part test has been employed when a state law has been alleged to fail to pass constitutional muster under the Contract Clause in regard to a contract between private contracting parties. *See Energy Reserves Group, Inc.,* 459 U.S. at 411-413. The first inquiry is whether the law has, in fact, operated as a substantial impairment of a contractual relationship. *Id.,* at 411, quoting *Allied Structural Steel Co.,* 438 U.S. at 244. Second, if the law constitutes a substantial

impairment, the State must have a significant and legitimate public purpose behind the law, such as remedying a broad and general social or economic problem. *Energy Reserves Group, Inc.*, 459 U.S. at 411-412, citing *United States Trust Co.*, 431 U.S. at 22 and *Allied Structural Steel Co.*, 438 U.S. at 247. The requirement of a legitimate public purpose guarantees the State is exercising its police power, rather than providing a benefit to some special interest. *Energy Reserves Group, Inc.*, 459 U.S. at 412. Finally, assuming a legitimate public purpose has been identified, the inquiry turns to whether the adjustments of the rights and responsibilities of the contracting parties is based on reasonable conditions and is of a character appropriate to the public purpose behind the law's adoption. *Id.*, quoting *United States Trust Co.*, 431 U.S. at 22. When the State is not itself a contracting party, courts properly defer to legislative judgment as to the need and reasonableness of any specific law. *Energy Reserves Group, Inc.*, 459 U.S. at 412-413 and n. 14, citing and quoting *United States Trust Co.*, 431 U.S. at 22-23.[19]

¶ 30 We have not been provided with any particular contract alleged to have been retroactively impaired by the Act. However, we assume one or more respondents (or others) have contracts – e.g., to sell birds to be used for fighting purposes – that were in existence prior to passage of the Act and that said contracts will be substantially impaired by the legislation because they will no longer be

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[19] Here, of course, respondents do not allege we are dealing with any contract to which the State itself is a party. When the State itself is a party to the contract, complete deference to the legislative assessment of reasonableness and need is not appropriate because the State's self-interest is at stake. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977).

subject to legal performance without running afoul of the prohibitory terms of the Act. In our view, however, such impairment does not constitute a violation of the Contract Clause of either the United States or Oklahoma Constitutions.

¶ 31 Unquestionably, the people acting in their legislative capacity, were acting in furtherance of a legitimate and reasonable exercise of the police power to prevent animal cruelty and to end human involvement in such cruelty, by enacting the ban on cockfighting and related activities. This is a significant and legitimate public purpose meant to remedy a broad and general societal problem and to outlaw an activity deemed injurious to public morals.[20] We also perceive no deficiency in the terms

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[20] Although we have found no case from the United States Supreme Court directly holding that cockfighting may be outlawed without running afoul of the Contract Clause, such was plainly implied in *dicta* contained in the case of *Exxon Corp. v. Eagerton,* 462 U.S. 176, n. 11 (1983). In *Exxon Corp.,* after quoting Justice Holmes in *Hudson Water Co. v. McCarter,* 209 U.S. 349, 357 (1908) that, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter" (*Exxon Corp.,* 462 U.S. at 190), the following was immediately set forth in n. 11 of *Exxon Corp.*:

> This point was aptly stated in an early decision holding that a statute prohibiting the issuance of notes by unincorporated banking associations did not violate the Contract Clause by preventing the performance of existing contracts entered into by members of such associations:
>
> > "[I]t is said that the members had formed a contract between themselves, which would be dissolved by the stoppage of their business. And what then? Is that such a violation of contracts as is prohibited by the Constitution of the United States? Consider to what such a construction would lead. Let us suppose, that in one

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of the Act as being of an appropriate character to carry out or implement the purpose behind the Act, particularly given the deference to which the legislative judgment is entitled as to the need and reasonableness of a particular measure. It seems to us that only by banning cockfighting and the related activities intended to lead to it can the purpose of the Act be achieved.

¶ 32 Furthermore, we believe it could not reasonably be expected by respondents or anyone else that cockfighting, simply because it was lawful prior to the Act's passage would always remain so. As set forth in **PART IV**, *supra* note 14, criminal statutes prohibiting cruelty to animals or instigating fights between animals have been part of Oklahoma law since at least the early 20th Century. *See Maloney v. State,* 1975 OK CR 22, 532 P.2d 78; Rev. Laws Okla. 1910, § 2746 (cruelty to animals); Rev. Laws Okla. 1910, §§ 2743-2744 (instigating fights between animals; keeping place for fighting animals).[21] Though in *Lock v. Falkenstine,* 1963 OK CR 32, 380 P.2d 278, the Oklahoma Court of Criminal Appeals held the criminal statute

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> of the states there is no law against gaming, cock-fighting, horse-racing, or public masquerades, and that companies should be formed for the purpose of carrying on these practices. And suppose, that the legislature of that state, being [seriously] convinced of the pernicious effect of these institutions, should venture to interdict them: will it be seriously contended, that the Constitution of the United States has been violated?" *Myers v. Irwin,* 2 Serg & Rawle 368, 372 (Pa.1816). (italics omitted).

[21] The current statutes are found at 21 O.S.Supp.2003, § 1685 (cruelty to animals) and 21 O.S.2001, §§ 1682-1683 (instigating fights between animals and keeping places for fighting animals).

prohibiting the instigation of animal fighting inapplicable to the fighting of gamecocks because that court held gamecocks were not animals within the contemplation of the statute, the Court of Criminal Appeals expressly presaged the potential for future prohibition of the activity by legislative action. *See id.* at 284. In other words, the prohibition against and criminalization of cruelty to animals generally has long been part of our State's history and over forty (40) years ago our Court of Criminal Appeals foreshadowed the potential for specifically outlawing cockfighting. Thus, regulation of this type, which the Act has now conclusively extended to birds, has long been recognized as the type of enactment (passed by either the Legislature or the people through the initiative), that would be understood as a valid police power regulation, notwithstanding its technical previous legality. Given this historical perspective, it is simply not a reasonable expectancy that an existent contract at the time of passage of the Act, which contains terms extending into the future concerning the use or sale of game fowl or gamecocks, would be immune from being overridden by valid police power regulation outlawing or prohibiting cockfighting. Therefore, we reject respondents' Contract Clause challenges.

PART VI. THE ACT DOES NOT VIOLATE OKLA. CONST. ART 2, § 2.

¶ 33 Respondents also challenge the Act under OKLA.CONST. art. 2, § 2, which provides, "[a]ll persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry." In the McCurtain County petition it is alleged, in effect, that the Act is unconstitutional in that it, "destroys [respondents']

inherent rights of life, liberty, pursuit of happiness, and the enjoyment of the gains of their industry without due process of law." We hold the Act does not violate OKLA.CONST. art. 2, § 2.[22]

¶ 34 In the first instance, respondents have cited no case that stands for the proposition that they or anyone else has the absolute inherent right to liberty, happiness or to enjoy the gains of their own industry through an activity that amounts to animal cruelty and we do not read their submissions to so argue. We are certainly aware of no such absolute right. Second, it has long been recognized that art. 2, § 2 was never intended to be viewed as protecting a right to do whatever one chooses or has the power to do, or that restrictions on an individual are valid only if necessary to

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[22] To the extent respondents seek to challenge the Act under OKLA.CONST. art. 2, § 2 on behalf of others **not** similarly situated to themselves, e.g., a copy shop owner they allege would violate the Act by providing a self-service copy machine to print fliers for a cockfight, the challenge is unavailing. See November 8, 2002 Plaintiffs' Preliminary Brief of their Challenge to the Constitutionality of State Question 687 to Ban "Cockfighting" in Oklahoma as Approved by the Electorate, pg. 19, which is an attachment to petitioners' January 2003 appendix. As we set out *infra* in **PART IX(E)**, note 43, the Act would not apply to allow prosecution of an unknowing copy shop owner that merely unwittingly permitted the use of a self-service copy machine. Furthermore, we do not read anything respondents have submitted to challenge the Act, merely by its passage, to have somehow deprived them of liberty, property or the gains of their industry without procedural due process. In any event, respondents received any procedural process that was their due through the initiative petition process and the subsequent November 2002 election, which resulted in the Act's passage. Also, to the extent respondents contend the Act somehow deprives them of property in violation of OKLA.CONST. art. 2, § 7, "[n]o person shall be deprived of life, liberty, or property, without due process of law," our discussion in the text as to substantive due process, here as to procedural due process and *supra* note 13, are sufficient to dispose of such contention.

protect the safety of others. *See One Chicago Coin's Play Boy Marble Bd. v. State,* 1949 OK 251, 212 P.2d 129, 132. It "is well settled that the legislature may, in the proper exercise of the police power, define and declare what is to be deemed injurious to public health, morals, safety and general welfare. And, the legislature is primarily the judge of whether certain facts or conditions justify regulation of a particular business for the public welfare." *Id.* (citations omitted); *See also Cotton Club v. Oklahoma Tax Commission,* 1945 OK 146, 158 P.2d 707, 708, *Second Syllabus* (police power is an inherent attribute of State sovereignty, under which the State, within constitutional limitations, may decide what is dangerous to public order, safety, health, morals and the general welfare of society). In other words, the rights guaranteed in OKLA.CONST. art. 2, § 2 are qualified. They are not absolute.

¶ 35 Here, the people acting in their legislative capacity have determined that cruelty to birds is injurious to public morals and the general welfare and it is not our place to second-guess that judgment, only to review the Act for constitutional infirmity. This Court has said concerning substantive due process and the rights protected by OKLA.CONST. art. 2, § 2:

> The Legislature is primarily the judge of whether facts and conditions exist that make it advisable that any certain business be regulated for the public good, under the police power, and as to what means are best adapted to regulate it, and every possible presumption is to be indulged in favor of the correctness of such finding, and though the courts may hold views inconsistent with the wisdom of such legislation, they may not annul it as being in violation of substantive due process unless it is clearly irrelevant to the

> policy the Legislature may adopt or is arbitrary, unreasonable or discriminatory.
>
> The inherent right to "life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own labor" guaranteed to the people by Sec. 2, Art. 2, of the state constitution, is subject to reasonable regulation in the exercise of the police power.

Jack Lincoln Shops, Inc. v. State Dry Cleaners' Board, 1943 OK 28, 135 P.2d 332, 333, *First and Second Syllabi, appeal dismissed,* 320 U.S. 208 (1943).[23]

¶ 36 We conclude the Act before us is not irrelevant to the policy sought to be accomplished nor is it arbitrary, unreasonable, capricious or discriminatory. In fact, as we noted in **PART V**, enactments of this type (i.e., banning cruelty to animals) seem to have long been recognized to fall within the scope of a legitimate exercise of the police power. The Act also does not unconstitutionally discriminate. All our people are forbidden from engaging in the activities prohibited by the Act. Although we acknowledge the Act has a greater impact on those engaged in cockfighting or related activities, than on those who have not pursued such activities, no constitutional doctrine of which we are aware requires that alone to doom the enactment. The bottom line is that under our form of government, a person's right to do as he or she chooses must yield to the reasonable laws of society. We are convinced the Act under review is a valid and reasonable law enacted by the people

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[23] "The Legislature and not the courts must determine the policy of the State to be voiced in statutory enactments. Legislative power, not wisdom, is the concern of the courts." *Cotton Club v. Oklahoma Tax Commission,* 1945 OK 146, 158 P.2d 707, 708, *Fifth Syllabus.*

through their reserved power of initiative; an enactment that plainly falls within the ambit of a proper, reasonable and constitutional exercise of the police power. Respondents' challenge to the Act under OKLA.CONST. art. 2, § 2 is rejected.

PART VII. THE ACT DOES NOT UNCONSTITUTIONALLY IMPAIR THE FUNDAMENTAL RIGHT TO TRAVEL.

¶ 37 Respondents challenge § 1692.5 of the Act as being unconstitutional based on the assertion it unnecessarily infringes on the right to travel. Section 1692.5 provides in pertinent part, "[e]very person who owns, possesses, keeps, or trains any bird with the intent that such bird shall be engaged in a cockfight, upon conviction, shall be guilty of a felony." Respondents' argument is as follows:

> Section [1692.5] . . . infringes the fundamental right to travel because it deters travel through Oklahoma by making the possession of birds to be used for fighting, which is perfectly legal in other states and countries, unlawful merely by passing through Oklahoma on a cross-country trip. . . . As written, [§ 1692.5] makes it a felony to possess any bird with the intent that the bird engage in a cockfight. A person traveling through, or flying over, Oklahoma to a cockfight in another state or country where cockfighting is legal could be convicted of a felony under [§ 1692.5]. Thus, [§ 1692.5] deters individual's [sic] from traveling through Oklahoma to another destination for a legitimate purpose. [Section 1692.5] therefore unnecessarily infringes on

> the *right to* travel and is unconstitutionally overbroad.[24]

There is no question a right to travel from one State to another is protected by the United States Constitution [*Saenz v. Roe,* 526 U.S. 489 (1999)] and also a constitutionally protected right to travel abroad/internationally. *See United States v. Bre[illegible]us,* 352 F.3d 200, 209-210 and n. 12 (5th Cir. 2003).

¶ 38 The United States Supreme Court has made it quite clear that the right to travel from one State to another "is firmly embedded in" this country's jurisprudence and that the right, depending on the context in which it is asserted and the law challenged, may emanate from more than one federal constitutional source. *See Saenz,* 526 U.S. at 500-504 (U.S.CONST. art. IV, § 2, cl. 1 and Fourteenth Amendment, § 1, the privileges and immunities clauses concerning state and national citizenship, respectively). The federal right of interstate travel has also been based upon the Commerce Clause of the United States Constitution (U.S.CONST. art. I, § 8, cl. 3[25]). *United States v. Guest,* 383 U.S. 745, 758-759 (1966); *Edwards v. People of the State of California,* 314 U.S. 160 (1941).

¶ 39 The right to travel interstate embraces at least three different components: 1) the right of a citizen of one State to enter and leave another State; 2) the right to be

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[24] The textually quoted argument is from pp. 20-21 of the McCurtain County brief (*supra* note 5), incorporated by respondents here – said brief contained in petitioners' January 2003 appendix.

[25] U.S.CONST. art. I, § 8, cl. 3 (the Commerce Clause) provides: "[t]he Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"

treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State; and 3) for travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[26] *Saenz*, 526 U.S. at 500. The right to travel abroad/internationally is also a protected and valued right, and is an important aspect of a citizen's liberty under the Fifth Amendment. *Kent v. Dulles*, 357 U.S. 116, 125-127 (1958). However, the right to travel abroad is accorded less stature than the right to travel interstate [*Haig v. Agee*, 453 U.S. 280, 306-307 (1981)] and is plainly subject to reasonable federal governmental regulation. *Id.* at 306. There is also no question the right to travel is subject to protection from improper State interference, but a State is not wholly ousted from exercising its police power in matters of local concern even though the right to travel may be affected. *See Edwards v. People of the State of California*, 314 U.S. at 172-173. In our view, respondents' challenge to § 1692.5 based upon the right to travel, either interstate or abroad, is devoid of any firm foundation and is without merit.[27]

¶ 40 Although it is somewhat difficult to understand exactly the contours of respondents' assertions in regard to their travel argument, to the extent they are claiming it would be a violation of § 1692.5 for a person to pass-through

[26] Plainly, respondents' travel challenge is not encompassed within the third component, as there is no assertion of any out-of-state resident seeking to become a permanent resident of Oklahoma.

[27] Respondents do not, in any brief submitted to us, expressly set forth the United States constitutional provision upon which they rely to support their travel claim. In view of our disposition, we need not definitively delineate the exact source in the federal Constitution upon which the right rests. As noted in the text, the right appears to be based on multiple portions of the United States Constitution.

Oklahoma **in possession of birds** intended to be fought in a State or country where cockfighting is legal, even assuming that § 1692.5 has sufficient reach to criminalize the mere passing-through Oklahoma **with birds intended to be fought** in another State or country where bird fighting is legal, the right to travel protected by the United States Constitution would not be impinged.[28] This is so because a federal law exists (obviously passed under Congressional authority to regulate interstate and foreign commerce under the Commerce Clause) that, among other things, bans and criminalizes the interstate and foreign transport of birds (as with other covered animals) for participation in an animal fighting venture, **even in circumstances where animal (including bird) fighting is lawful in the ultimate destination State or country**. 7 U.S.C. § 2156 (2000), as amended by Pub.L. No. 107-171, §§ 10301-10302, the amendments printed in 2002 U.S. CODE CONG. & AD. NEWS (Vol.1).[29]

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[28] In view of our disposition, we need not definitively decide whether § 1692.5 has sufficient reach to cover the mere pass-through situation apparently claimed by respondents it has. We do note, however, it would not necessarily be unusual for a State to apply its criminal laws to a person passing-through the State on his way to another State, who is on a mission involving illegal activity. *See Seke v. Commonwealth of Virginia*, 24 Va.App. 318, 482 S.E.2d 88 (1997) (Virginia convictions for possession of controlled substance with intent to distribute and transportation into Virginia of controlled substance with intent to distribute upheld even though defendant intended to distribute the drugs in North Carolina and he was only passing-through Virginia at the time he was caught with the drugs, his trip beginning in New York City and to end in North Carolina).

[29] 7 U.S.C. § 2156 currently provides:

(a) Sponsoring or exhibiting an animal in an animal fighting venture

(Continued on following page)

(1) In general Except as provided in paragraph (2), it shall be unlawful for any person to knowingly sponsor or exhibit an animal in an animal fighting venture, if any animal in the venture was moved in interstate or foreign commerce.

(2) Special rule for certain States

With respect to fighting ventures involving live birds in a State where it would not be in violation of the law, it shall be unlawful under this subsection for a person to sponsor or exhibit a bird in the fighting venture only if the person knew that any bird in the fighting venture was knowingly bought, sold, delivered, transported, or received in interstate or foreign commerce for the purpose of participation in the fighting venture.

(b) Buying, selling, delivering, or transporting animals for participation in animal fighting venture

It shall be unlawful for any person to knowingly sell, buy, transport, deliver, or receive for purposes of transportation, in interstate or foreign commerce, any dog or other animal for purposes of having the dog or other animal participate in an animal fighting venture.

(c) Use of Postal Service or other interstate instrumentality for promoting or furthering animal fighting venture

It shall be unlawful for any person to knowingly use the mail service of the United States Postal Service or any interstate instrumentality for purposes of promoting or in any other manner furthering an animal fighting venture except as performed outside the limits of the States of the United States.

(d) Violation of State law

Notwithstanding the provisions of subsection (c) of this section, the activities prohibited by such subsections shall be unlawful with respect to fighting ventures involving live birds only if the fight is to take place in a State where it would be in violation of the laws thereof.

(e) Penalties

Any person who violates subsection (a), (b), or (c) of this section shall be fined not more than $15,000 or imprisoned for not more than 1 year, or both, for each such violation.

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(f) Investigation of violations by Secretary; assistance by other Federal agencies; issuance of search warrant; forfeiture; costs recoverable in forfeiture or civil action

The Secretary or any other person authorized by him shall make such investigations as the Secretary deems necessary to determine whether any person has violated or is violating any provision of this section, and the Secretary may obtain the assistance of the Federal Bureau of Investigation, the Department of the Treasury, or other law enforcement agencies of the United States, and State and local governmental agencies, in the conduct of such investigations, under cooperative agreements with such agencies. A warrant to search for and seize any animal which there is probable cause to believe was involved in any violation of this section may be issued by any judge of the United States or of a State court of record or by a United States magistrate judge within the district wherein the animal sought is located. Any United States marshal or any person authorized under this section to conduct investigations may apply for and execute any such warrant, and any animal seized under such a warrant shall be held by the United States marshal or other authorized person pending disposition thereof by the court in accordance with this subsection. Necessary care including veterinary treatment shall be provided while the animals are so held in custody. Any animal involved in any violation of this section shall be liable to be proceeded against and forfeited to the United States at any time on complaint filed in any United States district court or other court of the United States for any jurisdiction in which the animal is found and upon a judgment of forfeiture shall be disposed of by sale for lawful purposes or by other humane means, as the court may direct. Costs incurred by the United States for care of animals seized and forfeited under this section shall be recoverable from the owner of the animals if he appears in such forfeiture proceeding or in a separate civil action brought in the jurisdiction in which the owner is found, resides, or transacts business.

(g) Definitions

For purposes of this section –

(1) the term "animal fighting venture" means any event which involves a fight between at least two

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¶ 41 Though the right to travel interstate and internationally is protected by the United States Constitution, the right is not absolute and it has been recognized there is no

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animals and is conducted for purposes of sport, wagering, or entertainment except that the term "animal fighting venture" shall not be deemed to include any activity the primary purpose of which involves the use of one or more animals in hunting another animal or animals, such as waterfowl, bird, raccoon, or fox hunting;

(2) the term "interstate or foreign commerce" means –

(A) any movement between any place in a State to any place in another State or between places in the same State through another State; or

(B) any movement from a foreign country into any State or from any State into any foreign country;

(3) the term "interstate instrumentality" means telegraph, telephone, radio, or television operating in interstate or foreign commerce;

(4) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(5) the term "animal" means any live bird, or any live dog or other mammal, except man; and

(6) the conduct by any person of any activity prohibited by this section shall not render such person subject to the other sections of this chapter as a dealer, exhibitor, or otherwise.

(h) Conflict with State law

The provisions of this chapter shall not supersede or otherwise invalidate any such State, local, or municipal legislation or ordinance relating to animal fighting ventures except in case of a direct and irreconcilable conflict between any requirements thereunder and this chapter or any rule, regulation, or standard hereunder.

fundamental right to travel for an illicit purpose. *United States v. Bredimus,* 352 F.3d at 210; *see also Hoke v. United States,* 227 U.S. 308, 320-323 (1913); *United States v. Burton,* 475 F.2d 469, 471 (8th Cir. 1973), *cert. denied,* 414 U.S. 835 (1973) (citizen's right to travel is subordinate to the Congressional right to regulate interstate commerce when the travel involves use of interstate facility for illicit purpose). In the instant case, the right respondents seek to vindicate and allegedly protect from improper State intrusion has already been curtailed by federal enactment under Congressional Commerce Clause authority, a federal enactment unchallenged on any ground by respondents here.[30]

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[30] As noted in the text, respondents do not attack in this case the validity of 7 U.S.C. § 2156 nor do they question Congressional authority to enact it under the Commerce Clause. In fact, although not expressly part of the travel argument made by them, respondents seem to take the position the federal law is not relevant to any issue in this case. See pg. 8 of October 20, 2003 Respondents' Response Brief to Petitioners' Brief in Support of Application to Assume Original Jurisdiction and Petition for Declaratory Relief. Respondents are incorrect that the federal law has no relevance to any issue in this case concerning the Oklahoma Act. At a minimum, the federal act has relevance to their right to travel challenge made to § 1692.5. It is plain enough to us that the federal act criminalizing the interstate and foreign transport of animals (including birds) had as one of its purposes, ensuring that in States where animal fighting is legal, that the animals used in such fighting sprout from **within** the State where such activity is legal and, as to foreign countries where the activity is legal, that the animals **not** come from the United States. In other words, the federal law seeks to prohibit from the channels of interstate and foreign commerce (i.e., between a state and a foreign country) the movement of animals intended to be used in fighting activities. Thus, respondents' pass-through travel argument is asking us to protect a right to travel for a purpose that is in violation of federal law. To us, this is nothing less than requesting us to protect a right to travel for an illicit purpose. This we decline to do.

¶ 42 Section 2156(h) of the federal law expressly provides: "[t]he provisions of this chapter shall not supersede or otherwise invalidate any such State, local, or municipal legislation or ordinance relating to animal fighting ventures except in case of a direct and irreconcilable conflict between any requirements thereunder and this chapter or any rule, regulation, or standard hereunder." Although respondents have not raised any conflict between the Oklahoma Act and § 2156, we perceive of no conflict. In fact, the two regulatory regimes appear to be congruent and harmonious: in the case of the federal law, denying the channels of interstate and foreign commerce for use in animal (including bird) fighting ventures; in the case of Oklahoma's Act, outlawing human involvement in bird fighting and related activities in the State. In essence, in view of the terms of § 2156, to uphold respondents' claim of unconstitutionality of the Oklahoma Act would mean nothing less than a holding there is a right to travel interstate and/or internationally, when such travel would be in violation of federal law and for an illicit purpose. There is no protected right to travel for an illicit purpose and there is no protected right to travel in violation of a federal law passed under authority of the Commerce Clause. Thus, we hold § 1692.5 does not unconstitutionally impinge upon the right to travel as argued by respondents.[31]

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[31] As to respondents' travel challenge, to the extent they question § 1692.5's interference with the right to travel of Oklahoma citizens/residents and their ability to raise, breed, grow, etc. birds in Oklahoma intended to be used for fighting purposes in other States or countries, § 1692.5 plainly **does** prohibit such conduct (i.e., raising or breeding them with such an intent). No valid travel challenge exists in regard to such conduct, however, for (at a minimum) the same reason(s)

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PART VIII. THERE IS NO VIOLATION OF OKLA. CONST. ART. 5, § 57.

¶ 43 OKLA.CONST. art. 5, § 57 provides in relevant part, "[e]very act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title. . . ." Section 57 applies to legislative acts promulgated by the people through the initiative process, as well as to those passed by the Legislature. *In re Initiative Petition No. 347 State Question No. 639,* 1991 OK 55, 813 P.2d 1019, 1026-1027. The purposes behind § 57 are essentially two-fold, 1) to insure that individual legislators and people are put on notice as to the effect of the legislation (*id.,* 813 P.2d at 1027) and 2) "that . . . a single subject be included in a legislative bill . . . to make impossible by log-rolling devices the enactment of unpopular legislation by including it with popular legislation on an entirely different subject." *Johnson v. Walters,* 1991 OK 107, 819 P.2d 694, 697, quoting *Bond v. Phelps,* 1948 OK 76, 191 P.2d 938, 950.

¶ 44 Section 57's purposes then are to forestall two abuses of the legislative process: 1) guarding against the enactment of legislation by surreptitious means (accomplished by

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we have set out concerning the failure of their pass-through travel claim.

Finally, to the extent respondents assert (regarding a travel right challenge to § 1692.5) that it would be a violation of § 1692.5 for a person to travel through Oklahoma **without any birds in the possession of such person** while on his or her way to a cockfight in another State or another country where cockfighting is legal, we deem such a reading of § 1692.5 to be wrong. Quite simply, nothing in § 1692.5 could reasonably be read to prohibit or criminalize the conduct of a person, **without any birds then in their possession**, from merely traveling through Oklahoma on his or her way to another State or country where cockfighting is legal, **who in that other State or country owns or possesses birds used in fighting**.

having the title clearly express the subject of a proposed law) and 2) prevention of log-rolling. *See Johnson v. Walters,* 819 P.2d at 707 and n. 2 (Lavender, J., concurring in part, dissenting in part). It is not constitutionally required, however, that the title contain a complete index of all details in the act. *In re Initiative Petition No. 347 State Question No. 639,* 813 P.2d at 1027. It is sufficient that matters in the act's text are germane to the title and that the title call attention to the general subject matter of the act. *Id.* The prevention of fraudulent and surreptitious legislation is the goal without unreasonably calling into question or annulling valid legislation. *Id.* Further, legislation containing provisions which are germane, relative and cognate to one another are sufficient to meet the unity-of-subject requirement. *See Campbell v. White,* 1993 OK 89, 856 P.2d 255, 260; *see also Rupe v. Shaw,* 1955 OK 223, 286 P.2d 1094, 1098-1101 (legislation is not multi-subject merely because it contains many details as long as the details are incidental to accomplishing the general object of the enactment).

¶ 45 Respondents argue the Act contains more than one subject and that its provisions were not clearly expressed in the title voted on by the electorate. The arguments are without merit. The Act is unequivocally concerned with one subject and it is a unified, germane whole, having as its central purpose the prevention of cruelty to birds by outlawing cockfighting and related activities and providing, after a criminal conviction, for the forfeiture of birds or equipment used in any cockfighting endeavor. It also criminalizes being a knowing spectator at a cockfighting event. The ballot title of the Act as submitted to and voted on by the people follows:

This measure adds a new section to Title 21 of the Oklahoma Statutes.

The measure makes cockfighting illegal. It defines "cockfight" or "cockfighting" as:

1. A fight between birds.

2. Whether or not fitted with spurs, knives, or gaffs.

3. Whether or not bets or wagers are made on the outcome of the fight.

The definition includes training fights.

The measure defines equipment used for training or handling a fighting bird.

Under the measure:

1. It is a felony to instigate or encourage cockfighting.

2. It is a felony to keep places, equipment or facilities for cockfighting.

3. It is a felony to aid or assist in cockfighting.

4. It is a felony to own, possess, keep or train birds for cockfighting.

Under the proposal it is a misdemeanor to knowingly be a spectator at a cockfight.

The measure provides for the forfeiture of birds and equipment use[d] in cockfighting.

¶ 46 As we read the title in conjunction with the Act, it is plain the above language submitted to the voters quite clearly spelled out the general subject of the Act and put the people on notice of the Act's provisions. Also, although

the Act itself is somewhat detailed, all of its provisions are germane to its central purpose, i.e., prohibiting cockfighting and related conduct associated with this type of animal fighting. Notwithstanding respondents' arguments to the contrary, we conclude the ballot title adequately described the proposed legislation that was voted on and that the Act covers but one subject. No violation of OKLA.CONST. art. 5, § 57 has been shown.[32]

PART IX. RESPONDENTS' VAGUENESS AND OVERBREADTH CHALLENGES ARE WITHOUT MERIT.

A. OVERVIEW.

¶ 47 Respondents also challenge the Act based on the claim it is unconstitutionally vague and overbroad on its face.[33] Pertinent jurisprudence used to decide if a criminal statute is unconstitutionally vague and/or overbroad plainly indicate the challenges raised must also fail. To begin, generally "in a facial challenge to the overbreadth

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[32] We note the Supreme Court of Missouri has held that a proposition voted on by that State's electorate prohibiting fighting involving animals (which included cockfighting) did not violate Missouri's constitutional one-subject or clear-title requirements. *United Gamefowl Breeders Association of Missouri v. Nixon,* 19 S.W.3d 137 (Mo. 2000).

[33] In our view, respondents' vagueness and overbreadth challenges are generally based on the Fourteenth Amendment standing alone, or as the First Amendment is incorporated through the Fourteenth Amendment, and applicable State Constitutional provisions, OKLA.CONST. art. 2, § 3 (right of assembly), presumably § 7 (deprivation of liberty or property without due process) and § 22 (free speech rights). To the extent any such claim is based on OKLA.CONST. art. 2, § 2 we believe our disposition in **PART VI, PART IX(E)** and **PART IX(G)**, and our discussion at *supra* notes 13 and 22, adequately covers the claim.

and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). As discussed below, the Act does not reach a substantial amount of constitutionally protected conduct and is not unconstitutionally vague or overbroad.

¶ 48 "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people understand what conduct is prohibited and in a manner that does not encourage arbitrary discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) (due process requires that "the terms of a penal statute creating a new offense must be sufficiently explicit . . . [rather than] in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application").[34] "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep that allows policemen, prosecutors, and

[34] When presented with the issue of the constitutionality of 21 O.S. § 1682, the animal fighting statute, the Oklahoma Court of Criminal Appeals set forth the following "judicial yardstick" to determine the validity of a statute challenged as unconstitutionally vague: "Is the Statute clear and explicit? Is it certain? Can a man of ordinary intelligence understand it? Does it deceive the common mind? Does a person of ordinary intelligence know when the Statute is being violated? Can the Court judicially determine the Legislative intent?" *Lock v. Falkenstine, supra* note 14, 380 P.2d at 282.

juries to pursue their personal predilections.'" *Kolender,* 461 U.S. at 358, quoting *Smith v. Goguen,* 415 U.S. 566, 574-75 (1974).[35] Finally, "[w]here a [penal] statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith,* 415 U.S. at 573.

¶ 49 Concerning facial overbreadth adjudication, the Supreme Court has stated, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but **substantial** as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973) (emphasis added). This Court has ruled that "[a] prerequisite to an overbreadth challenge is that the law itself will create a 'realistic danger' that first amendment protections will be compromised." *In re Initiative Petition No. 341,* 1990 OK 53, 796 P.2d 267, 269. Several individual parts of the Act are challenged on vagueness/overbreadth grounds, and each will now be addressed.

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[35] Stated another way, a penal statute "must provide explicit standards" so as to ensure it is not arbitrarily and discriminatorily enforced. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Although an enactment's terms may be plain, it may nevertheless be vague in that it fails to provide a "reasonably ascertainable standard of guilt." *Herndon v. Lowry,* 301 U.S. 242, 264 (1937).

B. Respondents assert the definition of "cockfight" or "cockfighting" is unconstitutionally vague and overbroad in failing to distinguish between innocent conduct and alleged harmful conduct.

¶ 50 Section § 1692.1(A) of the Act provides:

> "Cockfight" or "cockfighting" is a **fight between birds**, whether or not fitted with spurs, knives, or gaffs, and whether or not bets or wagers are made on the outcome of the fight, and includes any training fight in which birds are intended or encouraged to attack or fight with one another. (emphasis added).

Respondents criticize the law for broadly encompassing "all birds" instead of specifically limiting its prohibition to the fighting of "cocks." No authority is cited in support of the premise that the category of "all birds" is somehow constitutionally suspect. Respondents fail to illustrate how the sweep of a statutory category of birds renders the Act vague and/or how it impinges on First Amendment rights or otherwise infringes upon constitutionally protected conduct. Instead, they attack the definition generally because it "fails to make any distinction between normally proper and allegedly improper behavior" and therefore "invites, encourages and supports law enforcement abuses that will infringe upon the lives of every citizen who has traditionally enjoyed the nature of all birds, including their natural fights for food, or for survival."

¶ 51 In our view, the Act is notably absent any language (such as discretion to law enforcement officers to determine whether a violation of the statute has occurred[36]) that

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[36] The criminal provision in *Kolender v. Lawson*, 461 U.S. 352 (1983), was struck down as "unconstitutionally vague on its face because it encourage[d] arbitrary enforcement by failing to describe

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would suggest law enforcement application in any way other than even-handedly, and respondents fail to persuasively demonstrate how the Act, as written, invites law enforcement abuse. Rather, "[t]he language of the [statute] is sufficiently clear that the speculative danger of arbitrary enforcement does not render the [statute] void for vagueness." *Village of Hoffman Estates,* 455 U.S. at 503.

¶ 52 The Supreme Court has stated "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 800 (1984). Further, with respect to vagueness challenges, the Supreme Court has provided "'it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.'" *Broadrick,* 413 U.S. at 608, quoting *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548, 578-79 (1973).

¶ 53 Petitioner's [sic] Appendix to Brief in Support of Application to Assume Original Jurisdiction and Petition for Declaratory Relief contains pages of the transcript of witnesses' testimony presented at the McCurtain County temporary injunction hearing demonstrating such witnesses' – including the president of the Oklahoma Game Cock Breeders Association – understanding of the law as a ban on cockfighting. Clearly, this evidence supports a conclusion that the statutory definition of "cockfights"

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with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.* at 361.

and/or "cockfighting" is sufficiently definite to enable people of ordinary intelligence to understand what conduct is proscribed.

¶ 54 Respondents' reliance on *Chicago v. Morales,* 527 U.S. 41 (1999) to support their challenge is misplaced. The legislation at issue in *Morales* was a "loitering" provision, the definition of which was clear, but the uncertainty there was due to the ordinance's failure to specify what loitering was covered by it and what was not. In that the enactment involved in *Morales* failed to distinguish between innocent constitutionally protected conduct – "the freedom to loiter for innocent purposes" being a part of due process "liberty" rights – and conduct that would subject individuals to prosecution, the Supreme Court struck down the ordinance as unconstitutionally vague and overbroad. *Id.* at 53-55. Unlike the *Morales* situation, the Act here clearly and unambiguously defines the specific conduct of "cockfight" or "cockfighting," which would subject individuals to prosecution. The law on its face does not criminalize the enjoyment and/or observation of the natural activities of birds in their natural habitat. Contrary to *Morales,* here respondents have failed to identify any constitutionally protected interest at stake. Because they have failed to demonstrate how the definition of "cockfight" or "cockfighting" presents any " 'realistic danger' that first amendment protections will be compromised by the statutory definition," they have failed to establish the prerequisite to an overbreadth challenge. *In re Initiative Petition No. 341,* 796 P.2d at 269. The statutory definition of "cockfight" and "cockfighting" is not unconstitutionally vague or overbroad.

C. Respondents allege the term "encourages" is unconstitutionally vague and prohibiting a person from "instigating or encouraging a cockfight" is unconstitutionally overbroad.

¶ 55 Section 1692.2 provides in pertinent part, "[e]very person who **willfully instigates or encourages** any cockfight, upon conviction, shall be guilty of a felony." (emphasis added). Respondents posit that the term "encourages" "is plainly insufficient" to apprise an ordinary person of what conduct is prohibited. Additionally, they question whether an editorial opinion in a newspaper in favor of cockfighting would violate the statute and whether statements made to another to the effect that the person should hold a cockfight would violate it. In our view, to the extent this part of the Act may reasonably be construed to prohibit the verbal act of willful encouragement of cockfights, we note that the Supreme Court has provided that "[a] statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression is not too vague for a criminal law." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 574 (1942). As set out in more detail in the overbreadth analysis, we conclude the Act is carefully drawn and does not unduly impair liberty of expression. To the extent the prohibition against "willfully instigat[ing] or encourag[ing]" cockfighting, may be accomplished by a verbal act, it is not unconstitutionally vague.

¶ 56 Respondents cite *State v. Young,* 695 S.W.2d 882 (Mo. 1985) for the proposition the term "encourage" in an animal fighting statute is unconstitutionally vague. However, review of *Young* illustrates it was not the term "encourages" alone which prompted the Missouri Supreme Court's conclusion that the Missouri statute was unconstitutionally

vague.[37] The primary basis for determining the statute in *Young* was unconstitutionally vague and contravened due process was that it, as written, criminalized the mere presence at a place where cockfights are held. Critical to the decision was the Missouri statute's failure to contain the necessary "requirement of unlawful intent to give meaning to the presence provision." *Id.* at 885.

¶ 57 The opinion in *Young* additionally criticized several terms of the statute, which "read in the context of the entire statute" revealed "additional ambiguities." *Id.* at 886. Specifically, the Missouri Supreme Court criticized language in the statute, which "seem[ed] to make it unlawful to [encourage], 'aid or assist' **a place** used for cockfighting." *Id.* (emphasis added). They went on to note "[y]et it is more likely that one encourages other individuals, not places." *Id.* While respondents assert the term "encourage" in the Oklahoma statute is similarly vague and that just as one cannot encourage a place, one cannot encourage cockfighting, the plain meaning of the words of § 1692.2 taken as a whole and read in context along with the definition of "cockfight" demonstrate these provisions clearly prohibit **individuals** from encouraging **birds** to attack or fight. Thus, under the terms of the Oklahoma

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[37] The Missouri statute provided in pertinent part as follows:

> Any person who shall keep or use or in any way be connected with or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock or other creature, and any person who shall encourage, aid or assist or be present thereat, or shall permit or suffer any place belonging to him or under his control to be so kept or used, shall, on conviction thereof, be guilty of a misdemeanor. Mo. Rev. Stat. § 578.050 (1978).

statute, it is appropriately individuals who are prohibited from doing the acts of encouraging actual cockfighting. Additionally, common sense tells us that unlike places, which cannot be encouraged, birds can in fact be encouraged to attack one another, which is the conduct this part of the Act is designed to prohibit. *Young* is therefore distinguishable from the instant case, as the wording of the Oklahoma statute and particularly the term "encourage" in the context with the rest of the statute, is plain and unambiguous.

¶ 58 Furthermore, the Supreme Court of Iowa construed a similarly worded statute,[38] which prohibited "encouraging a cockfight," as not unconstitutionally vague nor overbroad. *State v. Todd,* 468 N.W.2d 462, 465-466 (Iowa 1991). In *Todd* it was held, the statute, "which makes it a crime to 'engage in, aid, abet, **encourage**, or assist' in any cockfight is sufficiently clear to give a person of ordinary intelligence fair notice of what is prohibited and provide the specific standards required for those who enforce it, and is not unconstitutionally vague under either the United States or Iowa Constitutions." *Id.* at 465 (emphasis added) (citation omitted). Just as in *Todd,* a person of ordinary intelligence can understand and is given fair

[38] The statute under review in *State v. Todd,* 468 N.W.2d 462 (Iowa 1991) (Iowa Code § 725.11) provided:

> If any person keep or use, or in any way be connected with, or be interested in the management of, or receive money for the admission of any person to, any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock, or other creature, or engage in, aid, abet, **encourage**, or assist in any bull, bear, dog, or cock fight, or a fight between any other creatures, the person shall be guilty of a serious misdemeanor. (emphasis added).

notice of what conduct is prohibited and therefore, respondents' vagueness challenge to the term "encourages" fails.

¶ 59 Respondents also assert § 1692.2's prohibition against "willfully instigat[ing] or encourag[ing] any cockfight" infringes upon and/or chills their First Amendment rights[39] because "it prohibits them from speaking freely about fights between birds." Although this statute may be interpreted to prohibit certain speech that "willfully instigates or encourages" cockfighting, the statute does not violate First Amendment rights because communication which incites the imminent lawless action of cockfighting does not constitute protected speech. The Supreme Court has ruled "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. *When such appeals do not incite lawless action,* they must be

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[39] Courts in other jurisdictions have soundly rejected First Amendment challenges to similarly worded anti-cockfighting statutes. *See e.g., State v. Todd, supra* note 38, 468 N.W.2d at 466 (holding the Iowa statute, which prohibits those who "engage in, aid, abet, encourage, or assist" a cockfight "is a description of 'easily identifiable and proscribable . . . conduct,' which falls within the statute's 'plainly legitimate sweep'" and is not unconstitutionally overbroad); *Commonwealth v. Balog, supra* note 9, 672 A.2d at 321 (holding statute making it a "felony to own, possess, keep, train, promote, purchase or knowingly sell any animal for animal fighting" is not unconstitutionally overbroad); *West Valley City v. Streeter,* 849 P.2d 613, 616 (Utah App. 1993) (holding statute stating "that it is unlawful for 'any person or corporation to raise, keep or use any animal, fowl or bird for the purposes of fighting or baiting' . . . is not unconstitutionally overbroad because it does not impinge on any constitutionally protected conduct"); *State v. Albee,* 118 Or. App. 212, 847 P.2d 858, 861 (1993), *review denied,* 316 Or. 528, 854 P.2d 940 (1993) (holding statute prohibiting person from "promoting, conducting, participating in or being spectator at exhibition of animal fighting" did not violate the First Amendment).

regarded as protected speech." *N.A.A.C.P. v. Claiborne Hardware Co.,* 458 U.S. 886, 928 (1982) (emphasis added).

¶ 60 In that the Oklahoma statute is primarily directed at the conduct of cockfighting and the willful instigation or encouragement of same, and "not merely speech is involved," the overbreadth test of *Broadrick v. Oklahoma* must be applied to determine whether the alleged overbreadth of this statute "is not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. The Act's sweep, even if it may be susceptible of some improper applications by reaching protected speech (not at all plain from the Act's terms), this reach is incidental and insubstantial in relation to the legitimate purpose to prohibit the conduct of willful instigation and encouraging cockfighting and as such is not substantially overbroad so as to render it unconstitutional on its face. *See id.* at 618.

¶ 61 We interpret the term "encourage" as prohibiting only speech and/or conduct, which encourages the **imminent** lawless action of cockfighting as distinguished from mere advocacy of the use of force or violence, which constitutes protected speech under the First Amendment. *See Brandenburg v. Ohio,* 395 U.S. 444 (1969); *Grayned v. Rockford,* 408 U.S. 104 (1972); *Chaplinsky v. New Hampshire, supra; N.A.A.C.P. v. Claiborne Hardware Co., supra.* The primary purpose of the Act is the prevention of cruelty to birds. In order for the Act to fulfill this purpose, it also prohibits the conduct of willful instigation or encouragement of a cockfight. In that communication encouraging, appealing to and inciting immediate cockfighting (now deemed lawless action under the Act) is geared to prohibit speech directed at inciting imminent lawless conduct, such speech is not protected speech under either the First

Amendment to the United States Constitution or under OKLA.CONST. art. 2, § 22.[40]

¶ 62 Finally, a reasonable, common sense reading of the statute does not prohibit any person from "speaking freely" about cockfighting, nor does it prohibit any other speech that merely advocates such conduct. Therefore,

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[40] The Supreme Court cases cited in the text [*N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Grayned v. City of Rockford, supra* note 35; *Brandenburg v. Ohio*, 395 U.S. 444 (1969); and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)] demonstrate "that "fighting words" – those that incite immediate breach of the peace," (*Chaplinsky*, 315 U.S. at 572) or "advocacy . . . directed to inciting or producing imminent lawless action and is likely to incite or produce such action," (*Brandenburg*, 395 U.S. at 447) – are not entitled to constitutional protection. Although this Court has determined "that the Oklahoma Constitution is more protective of speech than is the United States Constitution," (*In re Initiative Petition No. 366*, 2002 OK 21, ¶ 7, 46 P.3d 123, 126) (citations omitted), this protection is not absolute and clearly does not extend to "fighting words" and/or "incitement to imminent lawless activity." See *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, ¶ 19 and n. 46, 958 P.2d 128, 141-142 and n. 46 (citations omitted); *Price v. State*, 1994 OK CR 26, 873 P.2d 1049. Thus, respondents' assertion that part of the Act criminalizes all speech and/or editorial advocacy of a pro-cockfighting position (or alternatively criticizing and/or urging the repeal of the Act) is without merit because clearly such advocacy is protected speech and would not be subject to prohibition or prosecution under a common sense, reasonable interpretation and application of the plain meaning of the statutory language. *See State v. Albee, supra* note 39, 847 P.2d at 861 (unnecessary to decide if a restriction on gathering to discuss cockfighting would be a restriction on constitutionally protected conduct, because statute read not to prohibit that conduct). To the extent respondents assert the Oklahoma provision may have a chilling effect on protected speech, even if there may be such a chilling effect "to some unknown e tent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

§ 1692.2, as worded, is not substantially overbroad and it is not unconstitutional on its face.

D. Respondents contend that § 1692.3 is unconstitutionally overbroad in violation of a constitutional right to own and use property.

¶ 63 Section 1692.3 provides in pertinent part, "[e]very person who keeps any pit or other place, or knowingly provides any equipment or facilities to be used in permitting any cockfight, upon conviction, shall be guilty of a felony." Respondents claim the provision is so broadly written that it criminalizes any and all keeping of a pit or place for any purpose and thus, "the mere ownership of a gravel pit or sand pit would be a violation even if never used for a fight between birds." Petitioners' response to the assertion is that such an interpretation is absurd, and that § 1692.3 seeks to "penalize persons knowingly providing physical facilities or equipment for cockfighting." Petitioners are correct. It is virtually impossible to imagine any law enforcement officer, district attorney or other person from interpreting § 1692.3 in a manner as suggested by respondents. When the words "keeps any pit or other place" are read in context with the remainder of the statutory language, the prohibition is readily understood and clearly limited in scope to prohibit the keeping of "any pit or other place . . . to be used in permitting any cockfight."

¶ 64 The Supreme Court has provided, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council v. Taxpayers for Vincent, supra,* 466 U.S. at 800. This Court has provided that statutes should be "given rational construction" and construed in such a way as to avoid

absurdity. *Ledbetter v. Alcoholic Beverage Laws Enforcement Comm'n,* 1988 OK 117, 764 P.2d 172, 179; *Special Indem. Fund v. Choate,* 1993 OK 15, 847 P.2d 796, 807.

¶ 65 Other jurisdictions have upheld similar legislation under a common sense interpretation. The Supreme Court of Utah upheld an ordinance, which prohibited "keeping or using a gamecock for the purpose of fighting" or being a "party to or present as a spectator at such fighting." *Peck v. Dunn,* 574 P.2d 367, 368 (Utah 1978), *cert. denied,* 436 U.S. 927 (1978); *see also State v. Tabor,* 678 S.W.2d 45, 47 (Tenn. 1984) (ruling a statute "must be read with common sense and will be interpreted and applied by the courts only to prohibit persons from assembling deliberately and knowingly, to watch animals being exhibited, baited, or fought for the purpose of injuring other animals for amusement, sport or gain"). When faced with a strained interpretation of the anti-cockfighting legislation at issue there, *Peck* stated:

> [I]t is not our duty to indulge in conjecture that the statute may be so distorted or unreasonably applied that some innocent person might come within its terms. Rather, it is our duty to assume that those who administer a statute will do so with reason and common sense, in accordance with its language and intent; and further, that if there is a choice as to the matter of its interpretation and application, that should be done in a manner which will make it constitutional, as opposed to one which would make it invalid.

574 P.2d at 369.[41]

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[41] The plaintiff in *Peck v. Dunn,* 574 P.2d 367 (Utah 1978), *cert. denied,* 436 U.S. 927 (1978), argued the provision was unconstitutionally "vague and uncertain" because under its terms, an "innocent

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¶ 66 Respondents' assertion that the provision prohibits individuals from owning a sand pit or place for any purpose is a distorted and unreasonable interpretation, inconsistent with common sense. Clearly, it would be an impermissible application of the Act to prosecute someone for the keeping of a pit or other place for a legitimate legal purpose unrelated to cockfighting. The mere fact respondents can conceive of unreasonable impermissible applications of the Act is insufficient to render it unconstitutionally overbroad. Therefore, their overbreadth challenge premised upon a nonsensical interpretation is rejected.

E. Respondents challenge § 1692.4, which prohibits "any act" or "service" in furtherance of a cockfight, as unconstitutionally overbroad in violation of the First Amendment and OKLA.CONST. art. 2, § 2.

¶ 67 Section 1692.4 provides in relevant part:

> Every person who does **any act** or performs **any service in the furtherance of or to facilitate** any cockfight, upon conviction, shall be guilty of a felony. Such activities and services specifically prohibited by this section include, but are not limited to: promoting or refereeing of birds at a

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passing by onlooker" could be prosecuted. *Id.* at 369. The Utah Supreme Court rejected this interpretation, instead, determining "a sensible and practical application of the ordinance would require a person to be present as a spectator in the sense of one purposefully and intentionally attending and observing such a fight, as opposed to some mere passerby happening to so observe it." *Id.* at 370. Finally, the *Peck* Court announced, "[i]f the ordinance is thus looked at and applied in what we have stated to be a sensible and practical way, we see no justification for declaring it unconstitutional." *Id.*

> cockfight, advertising a cockfight, or serving as a stakes holder of any money wagered on any cockfight. (emphasis added).

In support of the argument the provision violates the First Amendment and "interfere[s] with a person's right to pursue a livelihood in violation of Article II, Section 2 of the Oklahoma Constitution,"[42] respondents assert that § 1692.4 prohibits "any act" or "service" without regard to whether the person actually acted or provided the service and had the intent to facilitate a fight between birds or "even had knowledge of the cockfight." They reiterate their assertion that this provision infringes upon First Amendment rights because it purportedly prohibits a person from making a speech in favor of a fight between birds, arguing such a speech constitutes an act in furtherance of a cockfight. Respondents also cite as an example of conduct purportedly subject to prosecution under § 1692.4, a copy-shop owner who provides a self-serve copier for the use of another to print fliers advertising a cockfight.

¶ 68 They also assert the provision provides for a strict liability offense and posit hypothetical prosecutions which, in our view, present a strained construction of the statutory language. As a starting point, because the statute is directed at conduct, i.e., "act or performs any service," and arguably may touch on speech incidental to such action and/or performance of service in the furtherance of or to

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[42] To the extent respondents' argument amounts to the assertion they have a constitutional or inherent right to earn a living by fighting birds or breeding them for fighting, which cannot be prohibited by valid police power legislation, the argument fails under both the United States and Oklahoma Constitutions. We believe our analysis as set forth in **PART IV**, **PART V** and **PART VI** adequately disposes of any such claim.

facilitate any cockfight, the overbreadth test of *Broadrick v. Oklahoma* must be applied to determine whether the alleged overbreadth of this statute "is not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. The statute's sweep, even if it is "susceptible of some . . . improper application" and reaches and/or chills protected speech at all, is incidental at best to the legitimate purpose of the subsection to reach the prohibited conduct of acts and services performed in the furtherance of or in facilitation of cockfights and is not substantially overbroad so as to render it unconstitutionally overbroad on its face. *See id.* at 618. Further, as previously noted, the U.S. Supreme Court has additionally provided "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. at 800.

¶ 69 This Court has provided "[i]n the interpretation of statutes, courts do not limit their consideration to a single word or phrase in isolation to attempt to determine their meaning, but construe together the various provisions of relevant legislative enactments to ascertain and give effect to the legislature's intention and will, and attempt to avoid unnatural and absurd consequences." *McNeill v. City of Tulsa,* 1998 OK 2, ¶ 11, 953 P.2d 329, 332; *see also Ledbetter v. Alcoholic Beverage Laws Enforcement Comm'n,* 764 P.2d at 179; *Special Indem. Fund v. Choate,* 847 P.2d at 807. Furthermore, regarding criminal statutory construction, the Oklahoma Court of Criminal Appeals has held "[w]here an act is readily subject to a narrowing construction which would avoid violation of the overbreadth doctrine, then that narrow construction should be

applied and the act should be upheld against a facial challenge." *Gilbert v. State,* 1988 OK CR 268, 765 P.2d 1208, 1210 (1988); *see also Walker v. State,* 1982 OK CR 5, 639 P.2d 1255 (construing Indecent Telephone Conversation criminal statute as containing an implied limitation that the prohibited language be spoken to an unwilling listener and thus, the statute was not unconstitutionally overbroad).

¶ 70 While § 1692.4 could have, and perhaps, should have been drafted more precisely with the inclusion of express terms of a culpable mental state, even in the absence thereof, a common sense reading of the provision in context with the rest of the Act leads us to conclude the plain intent was to prohibit knowing acts and/or services in furtherance of cockfighting such as the specific acts/services listed therein. *See Peck v. Dunn,* 574 P.2d at 369 (determining that despite the absence of express terms requiring a culpable mental state, a sensible and practical application of the cockfighting ordinance would require purposeful and intentional presence as a spectator as opposed to a mere passerby to fall within ordinance's terms).[43] Respondents' overbreadth challenge to § 1692.4 must fail.

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[43] The Supreme Court has determined the absence of a scienter requirement in an obscenity ordinance "may tend to work a substantial restriction on the freedom of speech and of the press." *Smith v. California,* 361 U.S. 147, 150 (1959). In *Smith,* the Court struck down an obscenity ordinance that imposed strict liability on a book seller (for the mere possession of obscene material without knowledge of the contents) as unconstitutional, reasoning that "[b]y dispensing with any requirement of knowledge of the contents of the book on the part of [a book] seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter." *Id.* at 153. In the aftermath of *Smith,* courts have determined the constitutionality of such obscenity

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F. Respondents allege the terms "spectator" and "preparations" as used in § 1692.6 are unconstitutionally vague and that prohibiting presence at cockfight preparations is unconstitutionally overbroad in violation of constitutionally protected rights to association and assembly.

¶ 71 Section 1692.6 provides:

> Every person who is **knowingly** present as a **spectator** at any place, building, or other site where **preparations** are being made for a cockfight with the **intent** to be present at such preparation or cockfight, or is **knowingly** present at such cockfight, upon conviction shall be guilty of a misdemeanor. (emphasis added).

Respondents assert the term "spectator" is insufficient to put an ordinary person on notice of conduct in which he/she may or may not lawfully engage. Contrary to the express language of the statute that plainly prohibits **knowing and intentional** presence, they also argue the law can be read to proscribe an innocent onlooker's mere

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legislation on the basis that such laws "must, either expressly or impliedly, require scienter." *Ellenburg v. State*, 215 Tenn. 153, 384 S.W.2d 29, 30 (Tenn.1964). Several states have implied scienter to statutes as a result of *Smith*. *See Ellenburg*, 384 S.W.2d at 30 (and cases cited therein). Just as scienter may be implied in the context of obscenity statutes, scienter may be implied in the context of § 1692.4 to prohibit "every person who [*knowingly*] does any act or [*knowingly*] performs any service in the furtherance of or to facilitate any cockfight." (emphasis added). To the extent the hypothetical copy-shop owner may be construed as analogous to the book seller in *Smith*, just as a book seller cannot be prosecuted for mere possession of obscene material of which he has no knowledge, an innocent copy-shop owner likewise cannot be prosecuted under § 1692.4 for another's copying of materials, the nature of which the copy-shop owner has no knowledge.

presence at a cockfight. They also seem to assert the provision somehow unconstitutionally impinges on rights to freely associate with others or to assemble. These arguments are without merit.

¶ 72 Courts in other jurisdictions faced with similar challenges to the term "spectator" in cockfighting and/or animal fighting legislation have rejected such vagueness challenges. *See Peck v. Dunn,* 574 P.2d at 369 (sensible and practical application requires a person to be present as a spectator in the sense of one purposefully and intentionally attending and observing such a fight, as opposed to a mere passerby happening to observe it); *State v. Tabor,* 678 S.W.2d at 47 (upholding cockfighting statute, which prohibits spectators who are knowingly and deliberately present at cockfight or at site where preparations are being made for such activities); *People v. Elder*, 201 Cal. App.3d 1061, 1070, 1073-1074 (5th Dist. Cal. App. 1988), *cert. denied,* 488 U.S. 1030 (1989) (noting "'spectator' is not a technical, legal term, but rather a word of common usage," and holding the term "spectator," when construed with the relevant portion of the statute, requires "'purposeful presence' as a spectator . . . for the purpose of watching the animal fighting and is constitutional as construed"). While Oklahoma's Act does not include a statutory definition of the term "spectator," it is the general "rule of statutory construction that words in a statute are to be understood in their ordinary sense, except when a contrary intention plainly appears." *Gilbert v. State,* 765 P.2d at 1210. In *Gilbert,* our Court of Criminal Appeals provided that a criminal statutory term need not be expressly defined in the statute itself, but that the meaning of such words are to be determined "in context" with the rest of the statute. *Id.*

¶ 73 Under the rule of *Gilbert,* the term "spectator" should be understood in its ordinary sense, which is "an observer of an event." AMERICAN HERITAGE DICTIONARY, 1173 (2d ed. 1985); *see also People v. Elder*, 201 Cal. App.3d at 1070 (providing additional common definitions of the term "spectator" from different dictionaries). We need not search for any implicit meaning behind the words of the statute, as the meaning is plain, to wit: the person subject to prosecution is one who is purposefully and knowingly present at a cockfight or at a place where preparations are being made for a cockfight. Respondents' hypothecation that the law ensnares within its ambit an innocent passerby who comes upon bird fight preparations and stops to determine what activity is occurring or that a law enforcement officer who is present to arrest others falls within the term "spectator" are unavailing. Neither hypothetical is reasonably within the Act's orbit, and, quite frankly, the law enforcement example is absurd and nonsensical. The term "spectator" as that word is understood in its ordinary sense in context with the statutory terms, is a purposeful, knowing or intentional observer of an event. Therefore, we reach the inescapable conclusion that the term, as construed with the rest of § 1692.6, is not unconstitutionally vague.

¶ 74 Respondents also challenge the term "preparations" contained in § 1692.6 as insufficient to put an ordinary person on notice of the conduct in which he/she may or may not lawfully engage, i.e., that it is unconstitutionally vague. They also assert prohibiting presence at cockfight preparations is unconstitutionally overbroad. As a practical matter these arguments overlap. In our view, the provision as properly understood does not suffer from unconstitutional vagueness or overbreadth.

¶ 75 In the first place, there is jurisprudence from other jurisdictions upholding as constitutional similarly worded statutes prohibiting spectators knowing presence at a place where "preparations" for cockfighting are taking place. *See State v. Albee,* 118 Or. App. 212, 847 P.2d 858 (1993), *review denied,* 316 Or. 528, 854 P.2d 940 (1993) (rejecting vagueness challenge to statute prohibiting person's presence as a spectator at a cockfight or "preparations thereto," even though such term is not defined by the statute); *State v. Tabor,* 678 S.W.2d at 47 (determining "there was nothing either uncertain or unclear about the meaning of" the Tennessee statute "prohibiting persons from knowingly being present as spectators at a cockfight or similar exhibition, or at a place where preparations are being made for such an exhibition"); *see also Peck v. Dunn, supra.*[44]

¶ 76 Secondly, we are guided by the general rule enunciated in *Gilbert,* which provides that we are to construe terms of a criminal statute in accordance with their

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[44] In 1990, after *State v. Tabor,* 678 S.W.2d 45, 47 (Tenn. 1984), the Tennessee Legislature amended that state's cockfighting statute by lowering the penalty for cockfighting from a felony to a Class A misdemeanor and decriminalized ownership and possession of cocks for breeding purposes. However, the subsection at issue in *Tabor* (and pertinent to our analysis here), which prohibited spectators' knowing presence at cockfighting preparations, was retained in the statute. Comparison of the Tennessee cockfighting statute with § 1692.6 reveals several similarities. The Tennessee statute provides in pertinent part as follows:

> "It is unlawful for any person to . . .
>
> (4) Be knowingly present, as a spectator, at any place or building where preparations are being made for an exhibition for such fighting, baiting or injuring of any animal, with the intent to be present at such exhibition, fighting, baiting or injuring." Tenn. Code Ann. § 39-14-203.

generally accepted meaning and in context with the rest of the statute. *Gilbert,* 765 P.2d at 1210. "Preparations" is understood generally as "the act or process of preparing or the state of being prepared; readiness. . . . Preliminary measures that serve to make ready for something." AMERICAN HERITAGE DICTIONARY, 978 (2d ed. 1985). When the term "preparations" is construed with the rest of the statutory language, the criminal offense is defined with sufficient definiteness that an ordinary person would understand what conduct is prohibited. In other words, the common sense meaning of the provision is that the person subject to prosecution as a spectator is one who purposefully, knowingly and intentionally is observing a cockfight or those preparations immediately prior to the cockfight at the cockfighting venue, that serve as preparations for the cockfight, e.g., exhibiting the birds before the fight. Section 1692.6 does not criminalize mere presence at a restaurant where other individuals are gathered to discuss or plan a fight between birds; mere presence at a store where others are purchasing supplies for a fight between birds; mere presence at a copy shop where fliers advertising a fight between birds are being printed by others; or mere presence at a barn that is being swept by another several days before a fight between birds is to be held there. The aforementioned are all examples put forward by respondents as conduct that could potentially fall under the terminology contained in § 1692.6. Respondents' interpretation is simply not a reasonable or common sense reading of the provision.[45] Therefore, § 1692.6 is not

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[45] To support their vagueness argument, respondents cite *State v. Wear,* 15 Ohio App.3d 77, 472 N.E.2d 778, 781 (12th Dist. 1984) (construing constitutionality of statute prohibiting "[a]ny person who knowingly purchases a ticket of admission to such place [kept for the

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unconstitutionally vague or overbroad as argued by respondents nor does it, as respondents contend, unconstitutionally violate a right to associate or assemble with others.

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purpose of cockfighting], or is present thereat, or witnesses such spectacle, is an aider and abettor") and *State v. Abellano,* 50 Haw. 384, 441 P.2d 333, 334 (1968) (construing constitutionality of statute prohibiting "any person to engage or participate in or to be present at, any cockfighting exhibition"). They also rely on *State v. Wear* to support the overbreadth claim. We are also aware of other authority supportive of respondents' general assertions. *See e.g., State v. Young,* 695 S.W.2d 882 (Mo. 1985) (holding cockfighting statute unconstitutionally vague because it prohibited the mere presence without the requirement that "the offender . . . be present at such a place for the purpose of being a spectator at a cockfight"). We acknowledge these authorities, but conclude they are distinguishable and/or inapplicable here because the Oklahoma Act contains express language of a culpable mental state of "knowing" and "intent," which qualify and limit the terms "present as a spectator," and because as we read the statute, the person subject to prosecution as a spectator is one who purposefully, knowingly and intentionally is observing a cockfight or those preparations immediately prior to the cockfight at the cockfighting venue, that serve as preparations for the cockfight, e.g., exhibiting the birds before the fight. To us, although § 1692.6 may have been worded more precisely, the terms of the provision refer to the place where the cockfighting event is to take place. As such, it does not ensnare within its provisions, as spectators, people anywhere they happen to be in the State merely because they are present at a locale where others are engaged in the activities of planning a cockfight or engaging in other activities preparatory thereto, e.g., someone who happens to be present at a store where another person is buying some type of equipment with the intent to use the equipment in a cockfighting endeavor.

G. Respondents contend § 1692.1(B), which declares certain equipment contraband and subjects it to potential seizure, is unconstitutionally vague[46] and overbroad in violation of a constitutional right to own and use property.

¶ 77 Section 1692.1(B) provides:

> 'Equipment used for training or handling a fighting bird' include knives or gaffs, cages, pens, feeding apparatuses, training pens and other related devices and equipment, and is hereby declared contraband and subject to seizure.

Respondents assert Section 1692.1(B), which includes specific items comprising the general category of "equipment used for training or handling a fighting bird," sweeps too broadly to include items without regard to whether such equipment or devices are used for fights between birds. They also assert that "all turkey feeders are contraband under the law." Although respondents do not specifically assert the provision's alleged overbreadth violates their First Amendment

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[46] Respondents raise this particular vagueness challenge in the brief of plaintiffs filed in the McCurtain County case (which is attached to petitioners' January 2003 appendix here). They urge the law "does not sufficiently define what conduct is unlawful" because they assert "[t]he [statutory] language does not require that the equipment of [sic] device be used for cockfighting." In that this vagueness challenge is premised upon an unreasonable and strained interpretation of the statutory language contained in this definition of § 1692.1(B), which plainly and unambiguously limits the category of equipment subject to seizure as only the "equipment used for training or handling a fighting bird," we reject this vagueness challenge. Furthermore, as we have set out in *supra* note 13, it is plain to us, any seizure of cockfighting-related equipment was only intended to be allowed consistent with the applicable dictates of the search and seizure provisions of the United States and Oklahoma Constitutions and pertinent State statutes concerning issuance of warrants and the seizure of property.

rights, they argue it "invades an individual's right to own and use property for traditionally normal purposes."[47]

¶ 78 Again, respondents seek to have us construe individual statutory words in isolation, while ignoring related plain language of the provision. To construe § 1692.1(B) as argued by respondents is inconsistent with this Court's longstanding rule of statutory interpretation, which provides "[i]n the interpretation of statutes, courts do not limit their consideration to a single word or phrase in isolation to attempt to determine their meaning, but construe together the various provisions of relevant legislative enactments to ascertain and give effect to the legislature's intention and will, and attempt to avoid unnatural and absurd consequences." *McNeill v. City of Tulsa,* 1998 OK 2, at ¶ 11, 953 P.2d at 332. In interpreting the meaning of the definitional terms, we are bound to construe the words together, which is accomplished by referencing each specific item in the statutory list with relation back to the category of "equipment used for training or handling a fighting bird" – rather than taking each listed item in isolation without reference to the general category to which the particular items are a part.

¶ 79 Further, this Court has ruled where a general statutory term is followed by the word "include," the primary import of words following that word indicates

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[47] The argument is related to respondents' similar assertion that the Act or one or more of its provisions violates a "right to pursue a livelihood." While respondents generally appear to label their conduct in this manner in an attempt to cloak it with constitutional protection, no authority is cited for the proposition that the real conduct at issue in this case – cockfighting and those activities or conduct outlined in the Act related to the cockfighting endeavor – is constitutionally protected.

"restricted meaning" to the general term, which came before it. *Application of Central Airlines, Inc.*, 1947 OK 312, 185 P.2d 919, 924. It is quite plain to us that the words "knives or gaffs, cages, pens, feeding apparatuses, training pens and other related devices and equipment," all of which follow the phrase "equipment used for training or handling a fighting bird" are words of restricted import and that they relate back to the preceding phraseology of the definition.[48] According to the applicable rules of statutory construction, such an "express [statutory] declaration of what is to be included leaves no room for enlargement through implication." *Id.* at 924. Contrary to respondents' argument, § 1692.1(B) does not declare all turkey (or any other category of bird) feeders contraband. The language on its face limits the category to "equipment used for training or handling a fighting bird." Thus, as plainly expressed in the terms of the provision, only those items of equipment or devices, which are used for training or handling a fighting bird, are included within the provision's sweep.

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[48] This rule is derived from the "ancient and generally accepted rule of construction known as 'Noscitur A Sociis' which . . . means: 'The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it.'" *Application of Central Airlines, Inc.*, 1947 OK 312, 185 P.2d 919, 923-924 (citation omitted); *see also Huffman v. Oklahoma Coca-Cola Bottling Co.*, 1955 OK 76, 281 P.2d 436, 440 (providing that "a statute should not be construed any more broadly or given any greater effect than its terms require. Where the language of the statute is clear in limiting its application . . . and leaves no room for doubt as to the intention of the legislature, there is no authority to transcend or add to the statute, [and the statute] may not be enlarged, stretched, or expanded, or extended. . . . ").

PART X. CONCLUSION.

¶ 80 The instant case is *publici juris* in nature, as it concerns the people or community at large and is imbued with the public interest. Further, there is a pressing need for this Court to decide the matter at the present time because District Court temporary restraining orders and/or temporary injunctions have, in effect, made it impossible for law enforcement officials in over twenty-five (25) counties to carry out their duties under the Act, even though no valid basis was or has been espoused or put forward by respondents to enjoin enforcement or prosecution under the Act. The case, therefore, presents one of those rare circumstances where the exercise of our discretion to assume original jurisdiction is called for to grant declaratory relief, notwithstanding that this Court and the District Courts have concurrent jurisdiction. We, therefore, assume original jurisdiction and rule on respondents' constitutional challenges to the Act.

¶ 81 A court's place, when called on to review constitutional challenges to legislation promulgated by the people through the initiative (as it is with statutory enactments passed by the Legislature), is not to second guess the law's wisdom, but to review the measure for constitutional conformity and to strike the enactment down only if found constitutionally infirm. In the instant case, the Act is a proper exercise of the police power, enacted by the electorate through the initiative process by virtue of its reserved legislative power. As a facial matter, the Act: does not constitute a taking or damaging of property for public use without just compensation; does not violate the Contract Clauses of either the United States or Oklahoma Constitutions as argued by respondents; is not impermissibly invasive of any right of respondents or others similarly

situated found in OKLA.CONST. art. 2, § 2, as asserted; does not impermissibly or unconstitutionally infringe upon a fundamental right to travel as claimed by respondents; was not promulgated in violation of OKLA.CONST. art. 5, § 57 as posited by respondents; and, finally, is not unconstitutionally vague or overbroad as claimed, so as to deprive respondents of liberty or property without due process of law, or so as to be violative of rights to free speech, assembly or association, as respondents assert.

¶ 82 Consistent with the views expressed in this opinion,

ORIGINAL JURISDICTION IS ASSUMED AND DECLARATORY RELIEF IS GRANTED.

¶ 83 WATT, C.J., HODGES, LAVENDER, HARGRAVE, KAUGER, BOUDREAU and WINCHESTER, JJ., concur.

¶ 84 OPALA, V.C.J. and EDMONDSON, J., disqualified.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN RE:	)	
INITIATIVE PETITION NO. 365.	)	NO. 94,155
STATE QUESTION NO. 687.	)	

CORRECTED REFEREE'S REPORT

(FILED Nov. 28, 2000)

MAY IT PLEASE THE COURT:

The following corrected report is submitted to attend to certain arithmetical and scrivener's errors, changing neither the substance, nor the ultimate conclusion reached in the previous report, filed herein on November 13th, 2000. The twenty day interval previously allowed for filing exceptions stands unaffected by this corrected report, and any exceptions heretofore addressed to the original report are deemed addressed to this corrected report as well.

This matter is a challenge to the numerical sufficiency of the signatures on Initiative Petition No. 365, State Question No. 687, which proposes a law to ban cockfighting in Oklahoma. On February 22, 2000, the matter was referred to the undersigned referee, with instructions to conduct hearings of the contest relative to the numerical sufficiency of the measure, and to report all findings of fact and conclusions of law to the court. Having fully performed the order of reference, the undersigned hereby makes return of the same.

The number of signatures necessary to place the proposal before the electorate is 69,887, representing eight

percent of the votes cast for the state office receiving the highest number of votes at the last general election preceding the filing of the petition, as provided by Article 5, Section 2 of the Oklahoma Constitution. I find the petition contains 59,162 valid signatures, and that it should be found numerically insufficient, for the reasons set forth hereafter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the day appointed for the commencement of trial, October 2nd, 2000, the protestants appeared in person and by counsel Larry Oliver of Tulsa, OK, and Lee Slater of Oklahoma City, OK, and the proponent appeared in person and by counsel Robert Sheets and Marc Edwards of Oklahoma City, OK. The adversaries announced ready for trial. Following opening statement, witnesses were sworn and evidence was taken in open court, continuing from day to day thereafter, until the parties' evidence was exhausted on November 2nd, 2000. Both sides rested, closing arguments were heard, and the issues tendered by the respective protests were taken under advisement. The proceedings were stenographically recorded by the reporting firm of Dauphin & Rogers of Oklahoma City, whose transcriptions are to be filed with the Clerk of the Supreme Court as the only official account of the hearings.

The protestants challenged 4120 signatures because they were collected by an individual who was not a qualified elector of the State of Oklahoma, contrary to the requirements of 34 O.S. 1991 § 3.1. A "Qualified elector" is defined by Article 3, Section 1 of the Oklahoma Constitution as a citizen of the United States over the age of eighteen years who is a bona fide resident of this state.

The protestants showed that petition circulator Don Card was a resident of Arizona, temporarily in Oklahoma for the purpose of circulating petitions on the anti-cockfighting measure, as well as the "English Only" petition, and petitions seeking ballot access for the Green Party and the Libertarian Party. The evidence affirmatively demonstrated that although Mr. Card had twice registered to vote in Oklahoma, his registrations were knowingly fraudulent. His 1995 registration was based on a false claim of residence at an address shown to be a vacant lot in Tulsa; his 1999 registration was based on a false claim of residence at the home of a Libertarian candidate, who gave evidence establishing that Mr. Card had never lived there. Mr. Card had actually found successive temporary lodgings at two Tulsa motels, using an Arizona driver's license to identify himself. He stayed at those motels only for the duration of the petition drives for which he was working as a paid circulator, before he inferably moved on to some other state, to work some other petition drive. He appears to be what has been referred to in the vernacular as a "Petition gypsy."

The evidence relating to Don Card is clear, convincing and unequivocal. It does not present a close question. Don Card has been conclusively proven not to have been a bona fide resident of the State of Oklahoma at any time during the ninety-day circulation period for this initiative measure, and was consequently ineligible to circulate the petition; all of the 4120 signatures gathered by him are disqualified.

The protestants challenged the signatures of individuals who had applied for voter registration contemporaneously with placing their signatures on the petition. This challenge is directly related to the National Voter

Registration Act of 1993 – the "Motor-voter" law. Unlike the former system which provided for instantaneous voter registration by an official voter registrar, the new regimen allows remote and mail-in applications for registration, without the participation or intervention of any official; but under the new scheme, registered-voter status is postponed until the remote application is approved by the appropriate official of the county election board, and the voter's name is officially entered on the voting rolls. 26 O.S. 1999 Supp. § 4-103 *et seq*. The evidence showed that in 433 instances, the voter-registration applications of petition signers were approved after the petitions they signed had been notarized, from which it necessarily follows that they were not registered voters at the time they signed the petition. Only legal voters may sign an initiative petition. 34 O.S. 1991 §§ 3, 23; *In re Initiative Petition No. 142, State Question No. 205*, 176 Okl. 155, 55 P.2d 355 (1936). These 433 challenges are well made, except that 290 of them relate to signatures gathered by Don Card, and have already been eliminated from consideration; the remaining 143 signatures in this category are disqualified.

Arling Medina, a circulator of the petition, testified that at no time did he appear before a notary to execute the affidavits attributable to him, nor was he ever placed under oath for any reason, up until the time of trial. He admitted he signed the affidavit portion of his petitions at home and delivered them pre-signed to the notary, or left them at his place of employment for the notary to retrieve in his absence. In all, Mr. Medina turned in petition counterparts containing 3366 signatures. The notary whose jurat is affixed to each of Mr. Medina's purported affidavits vehemently denies Mr. Medina's assertions. But

the notary's denial is not supported by her notarial log, from which Mr. Medina's name is conspicuously absent; and corroborating evidence from a co-worker lends much credence to Mr. Medina's story of leaving a stack of pre-signed petitions on a counter on his way out of the office, intending that they be picked up later by the notary. I consequently find Mr. Medina's impeachment of his own affidavits to be highly probably true.

The appearance of the circulator before a notary is not a mere formality, or technical requirement. Rather, the non-appearance of the affiant will destroy the verification, and invalidate the signatures on the corresponding sheets. *In re Initiative Petition No. 347, State Question No. 639*, 1991 OK 55, 813 P.2d. 1019 (Okl. 1991), *In re Initiative Petition No. 142, supra*. As a result, the 3366 signatures gathered by Mr. Medina are disqualified.

In contrast, circulator Inez Blandon testified that she signed all her petition affidavits in the presence of notary Evalena Herrian. Ms. Blandon explained that she was herself a notary and was fully aware of the importance of signing in the presence of the notary. Ms. Blandon testified that Dean Herrian, the husband of Evalena Herrian may also have been present when she signed her affidavits. Examination of the actual petition pages reveals that all of Ms. Blandon's affidavits were actually notarized by Dean Herrian; Evalena Herrian denied being present. This evidence does not tend to disqualify the signatures gathered by Ms. Blandon, but rather at most suggests a lapse in memory over the year between the time the affidavits were sworn and the time of the hearing. Further, as noted in *In re Initiative Petition No. 347, supra.*, this confusion does not impeach the oath of the circulator attesting to her status as a qualified elector, to the execution of

the signatures on the petition in her presence, and to her belief in the correctness of the signers' addresses. The protestants challenged the 300 signatures gathered by Ms. Blandon for defective notarization, but upon the foregoing evidence, the challenge should be rejected.

The protestants advanced challenges to 153 signatures on petition counterparts notarized by three notaries whose names were illegible, or were misconstrued by the volunteer workers checking the petition for notary defects. During the hearing, the proponents elicited testimony showing that these notaries were in fact properly qualified, and that as a result, these 153 challenges should be disallowed. The protestants also challenged 400 signatures on petitions notarized by Evalena Herrian, claiming the affidavits had been executed on September 16th, 1999, and that Ms. Herrian's notary bond was not filed with the Court Clerk in Oklahoma County until September 17th, 1999. Although one of the dates written in longhand on Ms. Herrian's bond form is September 17th, the Clerk's filing stamp reflects a filing date of the 16th of September, and will be regarded as conclusive. These 400 challenges are accordingly disallowed.

The remaining notary challenges advanced by the protestants are grounded on a showing that seventeen putative notaries either had never filed a copy of their commission from the Secretary of State, or had never filed the requisite bond, contrary to the plain language of 49 O.S. 1998 Supp. § 2. That statute provides that before entering upon the duties of his office, a notary must file his commission from the Secretary of State, along with a bond in the amount of $1000 with the Court Clerk for the county where the notary resides or is employed. The evidence stands unchallenged, the only dispute being the

effect to be given to the failure to file a bond. I conclude that the putative notaries in this challenge category were without power to perform notarial acts, such that the petition pamphlets notarized by them, containing 1246 signatures, must be disqualified. The parties have stipulated that if petition circulators Rozella Giddens and Susan Scott were called to testify, they would swear now to the truth of their affidavits witnessed by one of the above putative notaries in the Fall of 1999 – an effort by the proponents to rehabilitate the otherwise unverified petition counterparts containing 663 signatures. Such after-the-fact verification must be rejected. It is not the sort of *nunc pro tunc* reaffirmation of a partly-impeached, but otherwise effective affidavit that had actually been sworn before a notary as discussed in *In re Initiative Petition No. 347, supra.*, at 1035. Rather it is an attempt to create a new affidavit where there was none before, well after the expiration of the ninety-day circulation period prescribed by 34 O.S. 1991 § 8. Similarly, the proponent's effort to rehabilitate the work product of circulator Arling Medina must fail for the same reason.

The proponents further challenged pamphlets that were notarized, but left unsigned by the circulators, or signed by someone other than the circulator named in the heading of the affidavit. The effect of this category of challenge is to leave the petition unsworn, the same as if the circulator had failed to appear before a notary, and the 57 affected signatures must be disqualified.

During the course of the hearing, evidence was brought to light through the alertness of proponent's attorney tending to show that eight signatures on petition volume 25, page 4803 were forged. Counsel immediately communicated his belief to the protestants and to the

referee. The purported signers of that petition page were called to testify, and denounced the forgeries. Without objection, all eight forgeries are disqualified. Under the circumstances, this disqualification tends to cast suspicion on the three other signature sheets submitted by the circulator of page 4803, containing a total of 50 signatures, but there is no evidence proving the three other signature sheets contain forged signatures.

The evidence showed that 62 individuals signed the petition more than once. A voter may not sign an initiative petition more than once. *Oklahomans for Modern Alcoholic Beverage Controls, Inc. v. Shelton*, 1972 OK 133, 501 P.2d 1089 (1972). The 62 duplicate signatures must be disqualified.

The protestants introduced evidence from lay and expert witnesses tending to prove that this initiative petition was conducted in a careless and haphazard manner, with no more than perfunctory regard for the statutory requirements detailed in Title 34. The evidence showed that the measure did not begin as an effort by the people of Oklahoma to change Oklahoma law. Rather, the evidence established that the greater part of the funding for the measure came from out-of-state sources, and that both the initial impetus for the petition, and ongoing support and encouragement were supplied by "outside agitators," primarily Washington D.C. resident Wayne Pacelle, president of The Humane Society of the United States, and Arizona resident Jamie Massey, an animal rights activist. This evidence is uncontroverted and might be taken as true, and yet not disqualify a single signature. Though witnesses testified that Mr. Massey may have boasted he would gather 5000 signatures in Oklahoma, as he had done in Arizona, and that he may have actually

been observed gathering signatures at the post office in Lindsey, OK, the protestants have produced no evidence of even a single signature appearing on any of the filed counterparts of the petition attributable to the alleged circulation efforts of Mr. Massey.

The protestants advanced several thousands of technical challenges relating to the quality of penmanship, and exactitude in filling out all the required spaces for name and address, exhibited by the petition signers, circulators and notaries. These technical challenges were rationalized as being similar to those raised by litigants in previous numerical sufficiency challenges. Such challenges are essentially a collection of nitpicking, trivial and non-prejudicial defects, and have generally been disapproved by the court in such decisions as *Shelton*, *supra*.

The test routinely applied to these technical challenges by the court has been to consider whether the claimed defect [sic] were such as to impair the litigants' ability to make contact with the signer, or to check voter registration. But in this proceeding, as in no other in state history, the protestants were able to search a single, computerized official database of registered voters, maintained by the State Election Board, rather than by making laborious and time-consuming personal visits to the county election boards of the seventy-seven counties. One consequence of this modernization is that for the first time the protestants have been able to check the voter registration of every signer of the petition, and that if a signature were, for example, illegible, or an address incomplete, the protestants would challenge it for non-registration, rendering the thousands of technical challenges superfluous, and making scrutiny by the factfinder unnecessary.

Appropriately, therefore, the greater part of protestants' challenge focuses on the voter registration of the signers.

The protestants' case for numerical insufficiency is primarily dependent on the voter-registration challenges, developed through a search of the official records of the state. The protestants demonstrated the official character of the records maintained by the State Election Board through the testimony of Lance Ward, Secretary of the State Election Board. Evidence was produced showing how the official data were acquired by the protestants on reel-to-reel tapes, and entrusted to a computer expert who reliably converted the data to a self-contained, searchable program in CD-ROM format. The protestants established that except for converting the Election Board's materials to a form capable of being viewed on an ordinary personal computer, no substantive part of the official record was changed. The protestants established that identical copies of the official record were installed on a number of computers, and that in this way, a crew of workers were able to compare each name from the petition with the official record. If the name (or reasonable variation, eg: Jack for John, Ted for Theodore, Betty for Elizabeth) and exact address were not found, the workers were able to testify in open court that a particular petition signer was "Not found" on the official voter registration roll. Because the database being searched is the official voter registration record, such testimony constitutes clear and convincing evidence of non-registration. Proponent's attorney thoroughly questioned the workers on whether an exact match of address [sic] were really necessary, or whether a voter might be supposed to have moved to a new home. The workers declined to engage in such speculation, and appeared to have all been following the same instructions as to permissible

variations of name, and exact match as to address. In this manner, the protestants offered evidence raising voter registration challenges to 37,146 signers of the petition. The protestants have advised that 1529 of these voter registration challenges relate to signatures gathered by Don Card, and 1314 relate to signatures gathered by Arling Medina. Because the entire product of those circulators has been disqualified, the total of protestants' voter registration challenges must be reduced to 34,303.

Proponent responded to the evidence of non-registration by hiring two people to conduct a second examination of another list of voters' names. The proponent's voter-registration checkers were computer literate and experienced, and in both their direct examination and exhaustive cross-examination, were shown to be competent, thorough and fair. The larger part of proponent's voter registration evidence came into the record through the testimony of Kelly Rupp, who proved to be particularly imaginative and adroit in searching the database. Even so, in the time available before the hearing, the proponent's voter-registration checkers were able to respond to only 29,983 of protestants' 34,303 voter registration challenges. The effect of this difference is to allow 4,320 facially-adequate challenges to stand uncontroverted. But more important to the proponent's case in defense is the character of the database the two checkers were searching.

Brent Wilcox, the proponent's computer expert, who also conducted part of the proponent's voter-registration search, testified to the preparation of the database. Mr. Wilcox described the database as one prepared for the Democratic Party, to allow candidates to make personal contact with active voters in their districts. He explained that the list was prepared from a slightly out-of-date copy

of the official voter registration records acquired from the State Election Board that was then sent to an East-coast firm, to be "cleaned up" and converted to CD-ROM format, and to have adequate Post Office addresses added in – that many voter-registration records identified voters at addresses where no mail could be delivered (e.g.: "100 yards North of the pink mailbox," or "across from the General Store") or where a politician canvassing a neighborhood would be unable to find the voter. Mr. Wilcox explained that the East-coast firm used computer software acquired from the Post Office and the "National White Pages" to supply new addresses for the names on the official voter roll. The evidence showed that when a new address was supplied, it would not be appended or annexed to the old address, but rather the old address would be overwritten, and completely eliminated from the database. A letter from the East-coast firm was admitted into evidence, disclaiming responsibility for the effect of the alterations to the official list, and observing that if the proponent's true purpose for the use of the database had been made known, the alterations would have been handled much differently.

During argument, the proponent's unofficial voter contact list was belittled as an unacceptable substitute for the official voter registration records, and fairly characterized as " . . . data that was designed to sell soap for some politician." The protestants objected to the competence of proponent's unofficial database; it was admitted over their objection, upon the perception that it would be competent at least to demonstrate exact matches. The voter-registration work performed by Ms Rupp and Mr. Wilcox proved 2,681 exact matches, tending to conclusively rebut that number of protestants' voter-registration challenges.

During the course of the trial, proponent also produced voter registration cards tending to disprove 36 of protestants' challenges. But the remaining 12,463 instances where the proponent's voter contact list might show a match of names, or some similarity to a challenged voter's name; albeit at a different address, the evidence is of insufficient weight and reliability to overcome the protestants' showing of non-registration based on the official voter registration roll. For a like reason, the proponent's evidence of 1,835 signatures for which there were shown to be more than one registered voter of the same name will overcome neither the protestants' general evidence of non-registration, nor the "phone book possibles." This last *genre* of rebuttal evidence showed that for each of the multiple registered voters of the same name revealed in proponent's lists, there were additional unregistered possibilities to be found among the listings in the local telephone directories. Such treatment of proponent's unofficial voter contact list is consistent with this court's discussion of similar unofficial evidence in *In re Initiative Petition No. 317, etc.*, 1982 OK 78, 648 P.2d 1207 (1982).

During the course of the hearing, protestants repeatedly sought to compel the attendance of petition circulator Robert Godwin, who stubbornly refused to obey subpoenas and other court orders commanding him to appear. The protestants have asked that the 3,205 signatures gathered by Mr. Godwin be disqualified, as a sanction for his intransigent disobedience. But because the requested sanction would tend to penalize the proponent, who is blameless in this regard, rather than Mr. Godwin, the request should be denied. Mr. Godwin's deposition has been offered into evidence by the proponent, and though it does nothing to impair the protestant's charge of a careless

and haphazard petition drive, it otherwise reveals no colorable basis for a wholesale disqualification of signatures.

Similarly, the protestants moved for disqualification of 7,542 signatures gathered by petition circulator Billy Calvin. Protestants demonstrated that Mr. Calvin might be a hermit. Mr. Calvin's given address is an abandoned house with no utilities or evidence of recent habitation; he was incapable of being found and could not be served with process. Protestants argued that it was not logical to believe that a man so reclusive could somehow collect 7,542 signatures – nearly twice as many as any other circulator. Nevertheless, the evidence showed that Mr. Calvin truly exists, and is a bona fide resident of Oklahoma over the age of eighteen, making him a qualified elector and eligible to circulate the petition. Protestants point to no authority that would require a petition circulator to make himself available to the service of process, nor permit disqualification of signatures upon a process server's inability to achieve service. The request for disqualification of Mr. Calvin's 7,542 signatures should be denied.

The protestants produced evidence, argument and authority relating to the necessity for strict observance of the 90 day interval for circulation. This claim criticizes the proponent for taking advantage of the final weekend of the circulation period, where the 90th day fell on Saturday (according to protestants' calculation) – that it would be unfair and unlawful for proponent to continue gathering signatures on the ensuing Sunday and Monday, where the petition is due before the close of business on Monday. The petition was prefiled in the office of the Secretary of State on Monday the 13th of September, 1999, and the 90th day

thereafter would seem to be Sunday the 12th of December, 1999. The evidence showed 1590 signatures were notarized on Sunday, and 671 signatures were notarized on Monday, the 91st day. But there has been no showing that any signatures were actually gathered on either of those days, and for all that appears, the actual circulation of the petition may have ended on the 89th day, or even earlier.

The proponent demonstrated that 441 signatures were improperly disqualified by the Secretary of State, because the technical defects in notarization. This claim stands uncontroverted. These signatures should be added back to the 99,309 signatures certified by the Secretary of State, raising the number of presumptively-valid signatures to 99,750.

To sum up, the protestants have produced clear and convincing evidence tending to disqualify 43,305 of the 99,750 signatures appearing on the petition. The proponent has rehabilitated only 2,717 signatures, leaving the petition 10,725 short of the 69,887 signatures required by law.

Respectfully Submitted, this 28th day of November, 2000.

/s/ Gregory W. Albert
Gregory W. Albert, Referee

APPENDIX C

2001 OK 98

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

In re:	)
INITIATIVE PETITION NO. 365,	) For Official Publication
	) No. 94,155
STATE QUESTION NO. 687.	)

ORIGINAL ACTION CHALLENGING
VALIDITY OF SIGNATURES AND LEGAL
SUFFICIENCY OF INITIATIVE PETITION NO. 365,
STATE QUESTION NO. 687

(Filed Nov. 13, 2001)

¶ 0 This case comes before us as an original action to determine the numerical and legal sufficiency of an initiative petition that seeks to ban cockfighting in the state of Oklahoma.

INITIATIVE PETITION NO. 365 IS DECLARED
SUFFICIENT FOR SUBMISSION TO THE VOTE
OF THE PEOPLE OF THE STATE OF OKLAHOMA
AS STATE QUESTION NO. 687.

D. Kent Meyers, Roger A. Strong, Paige S. Bass, Crowe & Dunlevy, Oklahoma City, Oklahoma, attorneys for Opponents Tom Hargus and James T. Tyler.

Larry L. Oliver, Larry L. Oliver & Associates, P.C., Tulsa, Oklahoma, and Lee Slater, Oklahoma City, Oklahoma, attorneys for Opponents James Talley, Kelly Barger, Sheryl Maize, George Day, Joseph Clinton Phillips, D.D.S., Mark Kelly, Judy Hamilton, Jeffrey Pearce, Bill McNatt, and Mark Urbanosky and "John Doe."

Marc Edwards, Phillips McFall McCaffrey McVay & Murrah, P.C., attorney for Petitioners.

WINCHESTER, J.

¶ 1 This is an original action brought pursuant to 34 O.S.Supp.2001, § 8 by Opponents Tom Hargus and James T. Tyler and by Opponents James Talley, Kelly Barger, Sheryl Maize, George Day, Joseph Clinton Phillips, D.D.S., Mark Kelly, Judy Hamilton, Jeffrey Pearce, Bill McNatt, and Mark Urbanosky and "John Doe" challenging the numerical and legal sufficiency of Initiative Petition No. 365, State Question No. 687 that seeks to ban cockfighting in the State of Oklahoma. We hold numerical and legal sufficiency is established and that the petition meets the standards for submission to the people.

¶ 2 Pursuant to the order of this Court, a hearing was commenced on October 2, 2000, to determine factual issues relating to the petition. The hearing was concluded on November 2, 2000, and the record of proceedings was filed on December 18, 2000.

¶ 3 Opponents' challenges to the petition fall into two categories, to-wit: challenges to the numerical sufficiency of the signatures and numerous constitutional challenges. Petitioners argue that Opponents fail to meet their burden of clear and convincing proof regarding the invalidity of certain signature challenges and contend that the constitutional challenges lack merit.

STANDARD OF REVIEW

¶ 4 The proceeding in this Court is authorized by 34 O.S.Supp.2001, § 8, 1992 Okla.Sess.Laws, ch. 92, § 7 and is not appellate in character but constitutes a transference

to this Court by the Secretary of State "of all the papers and documents on file in his office relating to the initiative or referendum petition for an original investigation and hearing *de novo.*" *In re Initiative Petition No. 281, State Question No. 441,* 1967 OK 230, ¶ 5, 434 P.2d 941, 945. "[T]he real purpose of an initiative petition is to secure a vote of the people upon a proposed law or constitutional amendment." *In re Initiative Petition No. 281, State Question No. 441,* 1967 OK 230, ¶ 9, 434 P.2d 941, 946.

SIGNATURE CHALLENGES

¶ 5 When an opponent attacks signatures that appear on an initiative petition on the basis its signers were not registered voters, a presumption arises that the persons are registered voters. The opponent bears the burden of producing sufficient competent evidence to overcome this presumption. *In re Initiative Petition No. 249,* 1950 OK 238, ¶ 0, 222 P.2d 1032 (Syllabus). As we review Opponents' challenges herein, it is important to note that a successful challenge to a signature renders moot another challenge to that signature. *Oklahomans for Alcoholic Beverage Controls, Inc. v. Shelton,* 1972 OK 133, ¶ 15, 501 P.2d 1089, 1092.

¶ 6 Const. Art. 5, § 2 requires that the petition be signed by a number of legal voters equal to at least eight percent (8%) of "the total number of votes cast at the last general election for the State office receiving the highest number of votes at such election." The election to which we look is that of November, 2000, and the number of signatures necessary to place the instant petition before the people is 69,887. The Secretary of State determined the total number of signatures on the petition to be 99,750. The

initial number of opponents' non-registration challenges was 37,146 signatures. Successful challenge to 29,864 signatures would render the petition invalid. Opponents set forth the following individual challenges.

Signatures taken by circulator Robert Godwin: 3,205

¶ 7 Opponents challenge 3,205 signatures taken by a circulator named Robert Godwin, who refused to obey subpoenas and other court orders commanding him to appear. We deny this challenge because the evidence was not critical and it would penalize Petitioners, who are blameless with regard to this circulator's refusal to appear.

Signatures collected by Don Card: 4,120

¶ 8 Opponents challenge the validity of petitions circulated by Don Card on the basis Mr. Card was not a qualified elector as required in 34 O.S.Supp.2001, § 3.1 and under Oklahoma Constitution Article 3, § 1 that states, "Subject to such exceptions as the Legislature may prescribe, all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state, are qualified electors of this state." We note that a circulator is required only to be a "qualified elector," not a registered voter. *Oklahomans for Modern Alcoholic Beverage Controls, Inc. v. Shelton,* 1972 OK 133, ¶ 8, 501 P.2d 1089, 1092.

¶ 9 Evidence at the hearing established Mr. Card is a United States citizen over eighteen years of age. However, Opponents presented sufficient evidence at the hearing to support a finding that Mr. Card is not a qualified elector. Therefore, we must disqualify these 4,120 signatures.

Signatures taken by circulator Billy Calvin: 7,542

¶ 10 Opponents challenge 7,542 signatures gathered by a circulator named Billy Calvin. The evidence at the hearing established Mr. Calvin is a bona fide resident of the State of Oklahoma and is over the age of eighteen. Therefore, Mr. Calvin is a qualified elector and eligible to circulate the petition. As such, we deny this challenge.

Signatures of persons whose signatures on the petition pre-dated their voter registration dates: 143 *net* [433 total, 290 previously disqualified because collected by Don Card]

¶ 11 Opponents challenge these signatures and presented conclusive evidence 143 persons [net] applied for voter registration at the time they signed the petition. Pursuant to 34 O.S.Supp.2001, §§ 3, 6 and 23, only registered voters have the right to sign initiative petitions. Therefore, we must disqualify these 143 *net* signatures.

Signatures collected by Arling Medina: 3,366

¶ 12 One of the petition circulators, Mr. Arling Medina, testified that at no time did he appear before a notary public to execute the affidavits attached to the signatures he gathered. He also testified he did not sign such affidavits under oath. His testimony was corroborated by a coworker who testified that a Ms. Herrian, the circulator in charge who notarized Mr. Medina's signature, came to Mr. Medina's office to gather previously signed pamphlets. Evidence showed that Ms. Herrian's notary logs did not reflect any record of notarization for Mr. Medina. We have held that the failure of an affiant to appear personally before a notary destroys the verification and invalidates

the signatures on those sheets. *See, e.g., In re Initiative Petition No. 347,* 1991 OK 55, ¶ 48, 813 P.2d 1019, 1035, [citing *In re Initiative Petition No. 142, State Question No. 205,* 176 Okl. 155, 55 P.2d 455 (1936) and *In re Initiative Petition No. 281, State Question No. 441,* 434 P.2d 941 at pp. 953-956 (Okl.1967)]. Therefore, we must disqualify these 3,366 signatures.

Signatures involving defects arising from notarization

Signatures on petitions where the notaries failed to file proper notary bonds: 1,246

¶ 13 Before entering upon the duties of the office, a notary must file his or her commission from the Secretary of State and a one thousand dollar ($1,000.00) bond with the court clerk for the county in which the notary resides or is employed. 49 O.S.Supp.2001, § 2. The circulator's affidavit is required along with a valid notarization pursuant to 34 O.S.Supp.2001, § 6 and 12 O.S.Supp.2001, 432, respectively. We disqualified signatures on pamphlets in which the circulator's verification was before a notary public whose commission had expired in *Oklahomans for Alcoholic Beverage Controls, Inc. v. Shelton,* 1972 OK 133, ¶ 18, 501 P.2d 1089, 1093. The undisputed evidence in the instant case established the notaries on these 1,246 challenged signatures failed to file their bonds. As such, they were without power to perform notarial acts. We must disqualify these 1,246 signatures.

Signatures challenged for defective notarization: 300

¶ 14 Opponents challenge 300 signatures for defective notarization. The circulator of the petitions on which these

signatures appear, Ms. Inez Blandon, testified she signed her petition affidavits in the presence of Ms. Evalena Herrian, a notary. Ms. Blandon testified at the hearing that she believed Ms. Herrian's husband, Dean Herrian, might have been present when her petition affidavits were notarized. Evidence received during the course of the hearing revealed that, in fact, it was Mr. Herrian, not Mrs. Herrian, who actually notarized Ms. Blandon's affidavits. However, Ms. Blandon's confusion does not impeach her oath as a circulator, wherein she attested to her status as a qualified elector, to the execution of the petition signatures in her presence and to her belief in the correctness of the signers' addresses. *In re Initiative Petition No. 347, State Question No. 639,* 1991 OK 55, ¶ 49, 813 P.2d 1019, 1036. Therefore, we deny this challenge.

Signatures challenged for illegible notary names on petitions: 153

¶ 15 Opponents challenge 153 signatures on petitions for illegible notary names. At the hearing, Petitioners elicited testimony that established these notaries were properly qualified. Therefore, we deny this challenge.

Signatures challenged on the basis the notary public's bond was not filed with the Oklahoma County Court Clerk on the day of notarization: 400

¶ 16 Opponents challenge 400 signatures on petitions notarized by Ms. Evalena Herrian, contending the affidavits were executed on September 16, 1999, and Ms. Herrian's notary bond was not filed with the Oklahoma County Court Clerk until September 17, 1999. The record reflects that the Court Clerk's filing stamp on Ms. Herrian's bond form shows

a filing date of September 16, 1999, and we regard this as conclusive. Accordingly, we deny this challenge.

Signatures on petitions unsigned by the circulator or signed by someone other than the circulator named in the heading: 57

¶ 17 The record established the petitions containing these 57 signatures were not verified on the back by an affidavit signed by the circulator who gathered the signatures on the signature sheet. Some were blank, while others were signed by someone other than the named circulator, all in violation of the requirements of 34 O.S.Supp.2001, § 6. Section 6 requires each sheet of petitions containing signatures to be verified on the back by an affidavit signed by the circulator who gathered them. Therefore, we must disqualify these 57 signatures.

Forged signatures: 8

¶ 18 Petitioners' attorneys disclosed at the hearing that eight signatures were forgeries. Evidence confirmed this. Accordingly, we disqualify these 8 signatures.

Duplicate signatures: 62

¶ 19 Opponents presented uncontroverted evidence that 62 persons signed the petition more than once. "No legal voter properly can affix his signature to a petition more than one time. When a signature is duplicated, the duplicated signature is to be disregarded." *Oklahomans for Alcoholic Beverage Controls, Inc. v. Shelton,* 1972 OK 133, ¶ 13, 501 P.2d 1089, 1092-1093. Therefore, we disqualify these 62 signatures.

Numerous Hyper-Technical Challenges

¶ 20 Opponents presented numerous hyper-technical challenges of several thousand additional signatures at the hearing but offered no evidence a contesting party actually was prejudiced thereby. Thus, these challenges are not well taken and are denied. *Oklahomans for Alcoholic Beverage Controls, Inc. v. Shelton*, 1972 OK 133, ¶ 12, 501 P.2d 1089, 1093.

Signatures of persons identified as "not found" in Opponents' electronic database: 35,832 *net* (37,146 total; 1,314 collected by Arling Medina and previously disqualified.)

¶ 21 In a statutory scheme of the initiative and referendum process, the requirement that petition signers state their correct street addresses serves to prevent fraud by enabling Opponents "to trace purported signers and investigate their qualifications." *In re Initiative Petition No. 142, State Question No. 205*, 1936 OK 209, ¶ 23, 55 P.2d 455, 458. Opponents must show that the signers cannot with due diligence be located to ascertain their voter status, in order to meet their burden of "clear and convincing evidence" a signer is not a registered voter. The Oklahoma Election Management System (OEMS), enacted in 1990 and codified at 22 O.S.Supp.2001, § 3-101 et. seq., constitutes a single, computerized official database of registered voters maintained by the State Election Board. Opponents testified at the hearing that they utilized information they obtained from the Oklahoma Election Management System (OEMS), maintained by the state election board, in formulating the database they used to verify voter registration status of petition signers. Neither the above-stated purpose of the requirement that petition signers state their correct street addresses, nor the presumption that petition

signers are registered voters, has been extinguished by the adoption of the Oklahoma Election Management System. The OEMS does not relieve Opponents of their burden to establish by "clear and convincing evidence" that a petition signer is not a registered voter, in order to perfect a signature challenge.

¶ 22 In the instant case, Opponents do not argue the street addresses that appear on the petition pamphlets for these challenged signatures are incorrect, or that Opponents are unable to trace and investigate voter qualifications of these signers by means of their street address. Instead, Opponents presented evidence at the hearing that either the exact first, middle and last names, or the exact street addresses of the challenged signatures are "not found" in Opponents' database. Testimony that a petition signer is "not found" in Opponents' database does not meet the burden of presenting "clear and convincing evidence" a petition signer is not a registered voter. We take note that Petitioners produced voter registration cards for individuals whom Opponents alleged were "not found" in their database, at the hearing.

¶ 23 We also take note that inactive voters under 26 O.S.Supp.2001, § 4-120.2 would not be identified in such a database as Opponents, nor would active voters whose address changes were not current.[1] Indeed, the database

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[1] 26 O.S.Supp.2001, § 4-120.2, inactive voters, provides as follows:

> A. No later than June 1 of each odd numbered year and for the previous twenty-four (24) months, any voter for whom a first class mailing from the county election board was returned, any voter identified by the Secretary of the State Election Board as a potential duplicate, any voter who has surrendered his or her Oklahoma driver license to the Department of Public Safety upon being issued a driver license in

(Continued on following page)

another state, and any active registered voter who did not vote in the second previous general election or any election conducted by a county election board since the second previous general election and who has initiated no voter registration change shall be sent an address confirmation mailing prescribed by the Secretary of the State Election board and paid for by the state. Voters who do not respond to the confirmation mailing or whose mailing is returned as nonforwardable shall be designated as inactive sixty (60) days after the mailing. An inactive voter's status shall be changed to active under the following conditions:

1. With any registration change initiated by the voter; or

2. By voting in any election conducted by a county election board.

An inactive voter who does not vote in any election conducted by a county election board during the period beginning on the date of the confirmation mailing and ending on the day after the date, of the second successive general election for federal office shall be removed as a registered voter and all the information on that voter shall be destroyed. Each county election board secretary shall maintain a list of the names and addresses of all persons sent a confirmation mailing as described in this section and information on whether or not each such person has responded to the notice. Said list shall be maintained for twenty-four (24) months following the date or the second successive federal general election after the date of the confirmation mailing.

B. The secretary of each county election board shall cause all inactive voters in a precinct to be identified on the precinct registry.

C. No later than June 1 of each odd numbered year, the Secretary of the State Election Board shall identify duplicate voter registrations in the state and shall direct appropriate county election board secretaries to cancel the voter registration of all but the latest registration of duplicate voter registrations. Each county election board secretary shall maintain for twenty-four (24) months a list of the names and addresses of all canceled duplicate voter registrations. For the purposes of this subsection, duplicate voter

(Continued on following page)

Opponents utilized in checking the signatures for this petition was taken from voting records as to which addresses were due to be updated in the upcoming odd-numbered year, to-wit: 2001. The hearing on this matter occurred in October and November of 2000, just months prior to the next-scheduled update of addresses and nearly two years after the last official update. Therefore, we decline to accept Opponents' database as conclusive proof of current names and addresses of all registered voters in the state of Oklahoma. We hold that Opponents' evidence of "not found" in this database falls short of the "clear and convincing proof" necessary to rebut the presumption that petition signers are registered voters.

¶ 24 Opponents apparently made no effort to confirm or investigate the actual addresses given by these signers, but merely searched their database for exact matches as to full name and complete address. We continue to ascribe to our previous holding that the signatures of persons who give insufficient addresses without proof of a purpose to deceive, are presumed valid. This is true when Opponents, as in the case at bar, make no attempt to show that any of signers who allegedly gave insufficient addresses or whose first, middle and last names are not an exact match of those in Opponents' database could not have been located with due diligence. *See, e.g., In re Initiative Petition No.*

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registrations are those registrations which contain the following identical information on more than one registration:

1. First name, middle name or initial, last name, and the date of birth;

2. Driver license or social security number; or

3. Last name, date of birth, and the last four digits of the social security number.

317, State Question No. 556, 1982 OK 78, ¶ 40, 648 P.2d 1207, 1216. Opponents failed to present clear and convincing evidence of voter non-registration as to these 35,832 *net* challenges. Accordingly, these challenges are denied.

¶ 25 The number of successful challenges to signatures by Opponents stands at 9,002. This number falls short of the 29,864 required to invalidate the initiative petition on the basis of numerical insufficiency. We find 90,748 of the total 99,750 signatures determined by the Secretary of State are valid. As such, we hold that the initiative petition is numerically sufficient to be presented on the ballot for a vote of the people.

CONSTITUTIONAL CHALLENGES

¶ 26 Generally, we decline to declare an initiative invalid prior to a vote of the people except when there is a 'clear or manifest' showing of unconstitutionality. *See, e.g., In re Initiative Petition No. 362, State Question No. 669,* 1995 OK 77, ¶ 12, 899 P.2d 1145, 1151, citing *In re Initiative Petition No. 358, State Question No. 658,* 1994 OK 27, ¶ 7, 870 P.2d 782, 785. Accordingly, we decline consideration of the issues advanced by Opponents relative to asserted constitutional invalidity of the instant initiative petition.

CONCLUSION

¶ 27 From examination of all the evidence we conclude the petition is valid in the form required by statutes, that the petition is signed by a sufficient number of legal voters of this state, and that the petition should be submitted to the people for determination. Accordingly, we hold that the initiative petition is legally sufficient numerically and that

the ballot title meets the standards for submission to the people.

INITIATIVE PETITION NO. 365 IS DECLARED SUFFICIENT FOR SUBMISSION TO THE VOTE OF THE PEOPLE OF THE STATE OF OKLAHOMA AS STATE QUESTION NO. 687.

¶ 28 HARGRAVE, C.J., WATT, V.C.J., HODGES, LAVENDER, OPALA, KAUGER, BOUDREAU, WINCHESTER, JJ., concur.

¶ 29 SUMMERS, J., not participating.

APPENDIX D

IN RE: INITIATIVE PETITION NO. 365, STATE QUESTION NO. 687
2001 OK 98
55 P.3d 1048
72 OBJ 3416
Case Number: 94155
Decided: 11/13/2001
Modified: 07/02/2002
AS AMENDED: July 2, 2002
THE SUPREME COURT
OF THE STATE OF OKLAHOMA

In re: INITIATIVE PETITION NO. 365, STATE QUESTION 687

ORIGINAL ACTION CHALLENGING VALIDITY OF SIGNATURES AND LEGAL SUFFICIENCY OF INITIATIVE PETITION NO. 365, STATE QUESTION NO. 687

¶ 0 This case comes before us as an original action to determine the numerical and legal sufficiency of an initiative petition that seeks to ban cockfighting in the state of Oklahoma.

INITIATIVE PETITION NO. 365 IS DECLARED SUFFICIENT FOR SUBMISSION TO THE VOTE OF THE PEOPLE OF THE STATE OF OKLAHOMA AS STATE QUESTION NO. 687.

D. Kent Meyers, Roger A. Strong, Paige S. Bass, Crowe & Dunlevy, Oklahoma City, Oklahoma, attorneys for Opponents Tom Hargus and James T. Tyler.

Larry L. Oliver, Larry L. Oliver & Associates, P.C., Tulsa, Oklahoma, and Lee Slater, Oklahoma City, Oklahoma, attorneys for Opponents James Talley, Kelly Barger, Sheryl Maize, George Day, Joseph Clinton Phillips, D.D.S.,

Mark Kelly, Judy Hamilton, Jeffrey Pearce, Bill McNatt, and Mark Urbanosky and "John Doe."

Marc Edwards, Phillips McFall McCaffrey McVay & Murrah, P.C., attorney for Petitioners.

PER CURIAM.

¶ 1 This is an original action brought pursuant to 34 O.S.Supp.2001, § 8 by Opponents Tom Hargus and James T. Tyler and by Opponents James Talley, Kelly Barger, Sheryl Maize, George Day, Joseph Clinton Phillips, D.D.S., Mark Kelly, Judy Hamilton, Jeffrey Pearce, Bill McNatt, and Mark Urbanosky and "John Doe" challenging the numerical and legal sufficiency of Initiative Petition No. 365, State Question No. 687 that seeks to ban cockfighting in the State of Oklahoma. We hold numerical and legal sufficiency is established and that the petition meets the standards for submission to the people.

¶ 2 Opponents' challenges to the petition fall into two categories, to-wit: challenges to the numerical sufficiency of the signatures and numerous constitutional challenges. Petitioners argue that Opponents fail to meet their burden of clear and convincing proof regarding the invalidity of certain signature challenges and contend that the constitutional challenges lack merit.

STANDARD OF REVIEW

¶ 3 The proceeding in this Court is authorized by 34 O.S.Supp.2001, § 8, 1992 Okla.Sess.Laws, ch. 92, § 7 and is not appellate in character but constitutes a transference to this Court by the Secretary of State "of all the papers and documents on file in his office relating to the initiative or referendum petition for an original investigation and

hearing *de novo.*" *In re Initiative Petition No. 281, State Question No. 441,* 1967 OK 230, ¶ 5, 434 P.2d 941, 945.

¶ 4 This Court then transferred the matter to Referee Gregory Albert on February 22, 2000 to conduct hearings on the numerical and legal sufficiency of the signatures and to issue a report of his findings of fact and conclusions of law. The hearing commenced on October 2, 2000 and concluded on November 2, 2000. Referee Albert then issued an initial report on November 13, 2000. Petitioners made timely exceptions to this Report, and the Referee issued a Revised Report on November 28, 2000. The Referee's unchallenged findings will be accepted by this Court; we will review *de novo* those findings to which timely exceptions were made.

SIGNATURE CHALLENGES

¶ 5 When an opponent attacks signatures that appear on an initiative petition on the basis its signers were not registered voters, a presumption arises that the persons are registered voters. The opponent bears the burden of producing sufficient competent evidence to overcome this presumption. *In re Initiative Petition No. 249,* 1950 OK 238, ¶ 0, 222 P.2d 1032 (Syllabus). As we review Opponents' challenges herein, it is important to note that a successful challenge to a signature renders moot another challenge to that signature. *Oklahomans for Alcoholic Beverage Controls, Inc. v. Shelton,* 1972 OK 133, ¶ 15, 501 P.2d 1089, 1092.

¶ 6 Const. Art. 5, § 2 requires that the petition be signed by a number of legal voters equal to at least eight percent (8%) of "the total number of votes cast at the last general election for the State office receiving the highest number

of votes at such election." The election to which we look is that of November, 1998, and the number of signatures necessary to place the instant petition before the people is 69,887. The Secretary of State determined the total number of signatures on the petition to be 99,750. Opponents challenge the validity of 54,897 signatures. Successful challenge to 29,864 signatures would render the petition invalid. Opponents set forth the following individual challenges.

Signatures taken by circulator Robert Godwin: 3,205

¶ 7 Opponents challenge 3,205 signatures taken by a circulator named Robert Godwin, who refused to obey subpoenas and other court orders commanding him to appear. We deny this challenge because the evidence was not critical and it would penalize Petitioners, who are blameless with regard to this circulator's refusal to appear.

Signatures collected by Don Card: 4,120

¶ 8 Opponents challenge the validity of petitions circulated by Don Card on the basis Mr. Card was not a qualified elector as required in 34 O.S.Supp.2001, § 3.1 and under Oklahoma Constitution Article 3, § 1 that states, "Subject to such exceptions as the Legislature may prescribe, all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state, are qualified electors of this state." We note that a circulator is required only to be a "qualified elector," not a registered voter. *Oklahomans for Modern Alcoholic Beverage Controls, Inc. v. Shelton,* 1972 OK 133, ¶ 8, 501 P.2d 1089, 1092.

¶ 9 Evidence at the hearing established Mr. Card is a United States citizen over eighteen years of age. However, Opponents presented sufficient evidence at the hearing to support a finding that Mr. Card is not a qualified elector. Therefore, we must disqualify these 4,120 signatures.

Signatures taken by circulator Billy Calvin: 7,542

¶ 10 Opponents challenge 7,542 signatures gathered by a circulator named Billy Calvin. The evidence at the hearing established Mr. Calvin is a bona fide resident of the State of Oklahoma and is over the age of eighteen. Therefore, Mr. Calvin is a qualified elector and eligible to circulate the petition. As such, we deny this challenge.

Signatures of persons whose signatures on the petition pre-dated their voter registration dates: 143 *net* [433 total, 290 previously disqualified because collected by Don Card]

¶ 11 Opponents challenge these signatures and presented conclusive evidence 143 persons [net] applied for voter registration at the time they signed the petition. Pursuant to 34 O.S.Supp.2001, §§ 3, 6 and 23, only registered voters have the right to sign initiative petitions. Therefore, we must disqualify these 143 *net* signatures.

Signatures collected by Arling Medina: 3,366

¶ 12 One of the petition circulators, Mr. Arling Medina, testified that at no time did he appear before a notary public to execute the affidavits attached to the signatures he gathered. He also testified he did not sign such affidavits under oath. His testimony was corroborated by a co-worker who testified that a Ms. Herrian, the circulator in charge who notarized Mr. Medina's signature, came to Mr. Medina's office to gather previously signed pamphlets.

Evidence showed that Ms. Herrian's notary logs did not reflect any record of notarization for Mr. Medina. We have held that the failure of an affiant to appear personally before a notary destroys the verification and invalidates the signatures on those sheets. *See, e.g., In re Initiative Petition No. 347,* 1991 OK 55, ¶ 48, 813 P.2d 1019, 1035, [citing *In re Initiative Petition No. 142, State Question No. 205,* 176 Okl. 155, 55 P.2d 455 (1936) and *In re Initiative Petition No. 281, State Question No. 441,* 434 P.2d 941 at pp. 953-956 (Okl. 1967)]. Therefore, we must disqualify these 3,366 signatures.

Signatures involving defects arising from notarization

Signatures on petitions where the notaries failed to file proper notary bonds: 1,246

¶ 13 Before entering upon the duties of the office, a notary must file his or her commission from the Secretary of State and a one thousand dollar ($1,000.00) bond with the court clerk for the county in which the notary resides or is employed. 49 O.S.Supp.2001, § 2. The circulator's affidavit is required along with a valid notarization pursuant to 34 O.S.Supp.2001, § 6 and 12 O.S.Supp.2001, § 432, respectively. We disqualified signatures on pamphlets in which the circulator's verification was before a notary public whose commission had expired in *Oklahomans for Alcoholic Beverage Controls, Inc. v. Shelton,* 1972 OK 133, ¶ 18, 501 P.2d 1089, 1093. The undisputed evidence in the instant case established the notaries on these 1,246 challenged signatures failed to file their bonds. As such, they were without power to perform notarial acts. We must disqualify these 1,246 signatures.

Signatures challenged for defective notarization: 300

¶ 14 Opponents challenge 300 signatures for defective notarization. The circulator of the petitions on which these signatures appear, Ms. Inez Blandon, testified she signed her petition affidavits in the presence of Ms. Evalena Herrian, a notary. Ms. Blandon testified at the hearing that she believed Ms. Herrian's husband, Dean Herrian, might have been present when her petition affidavits were notarized. Evidence received during the course of the hearing revealed that, in fact, it was Mr. Herrian, not Mrs. Herrian, who actually notarized Ms. Blandon's affidavits. However, Ms. Blandon's confusion does not impeach her oath as a circulator, wherein she attested to her status as a qualified elector, to the execution of the petition signatures in her presence and to her belief in the correctness of the signers' addresses. *In re Initiative Petition No. 347, State Question No. 639,* 1991 OK 55, ¶ 49, 813 P.2d 1019, 1036. Therefore, we deny this challenge.

Signatures challenged for illegible notary names on petitions: 153

¶ 15 Opponents challenge 153 signatures on petitions for illegible notary names. At the hearing, Petitioners elicited testimony that established these notaries were properly qualified. Therefore, we deny this challenge.

Signatures challenged on the basis the notary public's bond was not filed with the Oklahoma County Court Clerk on the day of notarization: 400

¶ 16 Opponents challenge 400 signatures on petitions notarized by Ms. Evalena Herrian, contending the affidavits were executed on September 16, 1999, and Ms.

Herrian's notary bond was not filed with the Oklahoma County Court Clerk until September 17, 1999. The record reflects that the Court Clerk's filing stamp on Ms. Herrian's bond form shows a filing date of September 16, 1999, and we regard this as conclusive. Accordingly, we deny this challenge.

Signatures on petitions unsigned by the circulator or signed by someone other than the circulator named in the heading: 57

¶ 17 The record established the petitions containing these 57 signatures were not verified on the back by an affidavit signed by the circulator who gathered the signatures on the signature sheet. Some were blank, while others were signed by someone other than the named circulator, all in violation of the requirements of 34 O.S.Supp.2001, § 6. Section 6 requires each sheet of petitions containing signatures to be verified on the back by an affidavit signed by the circulator who gathered them. Therefore, we must disqualify these 57 signatures.

Forged signatures: 8

¶ 18 Petitioners' attorneys disclosed at the hearing that eight signatures were forgeries. Evidence confirmed this. Accordingly, we disqualify these 8 signatures.

Duplicate signatures: 62

¶ 19 Opponents presented uncontroverted evidence that 62 persons signed the petition more than once. "No legal voter properly can affix his signature to a petition more than one time. When a signature is duplicated, the duplicated signature is to be disregarded." *Oklahomans for Alcoholic Beverage Controls, Inc. v. Shelton,* 1972 OK 133,

¶ 13, 501 P.2d 1089, 1092-1093. Therefore, we disqualify these 62 signatures.

Signatures of persons identified as "not found" in Opponents' electronic database, consisting of data from the Oklahoma Election Management System: 34,303 *net* (37,146 total; 1,314 collected by Arling Medina and 1,529 collected by Don Card, previously disqualified).

¶ 20 In this proceeding, as in no other before this court, Opponents were able to compare the names and addresses of those signing the petition against the list of registered voters maintained by the Oklahoma Election Management System (OEMS). The OEMS, enacted in 1990 and codified at 26 O.S.Supp.2001, § 3-101 constitutes a single, computerized official database of registered voters maintained by the State Election Board. Opponents demonstrated at the hearing that they secured the OEMS records for the period during which the petition was circulated. Opponents then converted names and addresses from the OEMS to an electronic database, against which the names and addresses on the petition were compared. Petitioners challenged the validity of the Opponents' database because it did not include certain information contained in the OEMS such as voting history, precinct information, and party affiliation. Petitioners also challenge the accuracy and stringency of Opponents' method of comparison. Finally, Petitioners challenged the authority and admissibility of the OEMS and the Opponent's database.

¶ 21 We uphold the unchallenged finding of the Referee that, besides these presently irrelevant categories (voting history, precinct information, and party affiliation), the Opponents' database otherwise mirrored the records of the

OEMS with regard to the listing of registered voters. We also hold that as the official record of voter registration in Oklahoma, the OEMS serves as the authoritative tool for establishing registration and non-registration. Because the OEMS is maintained by the State Election Board, it is an official compilation which carries a presumption of correctness. As we have stated, "in the absence of evidence by the petitioner that the records were incomplete this is a sufficient showing of the correctness of the records, since the presumption is that public officials perform their duty." ***In Re Referendum No. 119, State Question No. 381,* 1959 OK 90, ¶ 8; 339 P.2d 530.** But, as with any human endeavor, errors may occur in the process of comparing the signers of a petition against the OEMS. This imprecision will be compounded greatly if a petition's challengers require an overly-stringent match between the petition signer's name or address and the OEMS. We note that challengers to a petition often have strong incentives to require such an exacting match, and the result of these incentives is a difficulty in determining the true registration status of a petition's signers.

¶ 22 We therefore take this opportunity to state explicitly the process used to determine the degree of similarity and accuracy required in comparing a name listed on a petition to the OEMS. A petition's challengers may establish a *prima facie* case of non-registration by proving that a petition signer is not found in the OEMS during the time of the petition's circulation. A challenger's *prima facie* case may be overcome by a petition's proponents. Petitioners may specifically rebut a challenged signature by offering proof that a challenged voter is in fact registered. More broadly, petitioners may defeat a class of challenges by establishing that opponents were generally capricious,

unreasonable, or inaccurate in comparing the names or addresses of the petition signers against the OEMS. For example, suppose a petition's opponents challenge a petition signer's registration because the address the signer lists on the petition does not match the address in the OEMS. Just as a voter must rebut an assumption of non-registration caused by a failure to find his or her name or address on the official registration list at a voting booth by presenting adequate documentation of his or her identity and address, Petitioners must rebut opponent's challenge of non-registration by proving that the signer is a registered voter who, for instance, has moved but failed to update his or her address for the OEMS. As we have established, "[t]he need for an address is for verification purposes; if a signer can be located through due diligence, then the address given is sufficient." *In re Initiative Petition 317, State Question No. 556*, 1982 OK 78, ¶ 40, **648 P.2d 1207**. Obviously, these categories of rebuttals are not mutually exclusive. If Petitioners overcome a significant number of challenges during the course of a hearing, it could lead us to find that Opponents were on the whole insufficiently fair or careful in their efforts.

¶ 23 Throughout this process a petition's opponents shoulder the ultimate burden of proving non-registration *clearly and convincingly.* "There is no presumption of accuracy as to the check of these records and it is the duty of [Opponents] to offer clear and convincing evidence of nonregistration." ***In Re Referendum No. 119, State Question No. 381,* 1959 OK 90, ¶ 9, 339 P.2d 530**. Neither the OEMS nor the three-stage test lessens this burden. Rather, the OEMS is an authoritative tool which may be used to establish non-registration, and the burden-shifting framework merely

establishes explicitly the process used to evaluate the validity of signatures.

¶ 24 Analyzing the current case under this approach, Opponents challenge 34,303 net signatures for non-registration because the names and/or addresses were "not found" in the Opponents' copy of the OEMS. "Not found" in this context means that Opponents' checkers found that the first name was not sufficiently similar and/or that the middle initial, last name, or address was not an exact match of a listing in the Opponents' database. Petitioners were unable to reach 4,320 of the challenges, and 12,968 were inadequately rebutted, leaving these 17,288 signatures successfully challenged and thus disallowed. Of the remaining 17,015 signatures, Petitioners specifically rebutted 36 signatures by producing voter registration cards. Further, Petitioners cast doubt on Opponents' system of checking signatures by proving during the constraints of the hearing that 2,681 signatures challenged by Opponents were in fact exact matches of *names and addresses* found in the OEMS. Finally, Petitioners showed that in 14,298 challenged signatures, at least one exact match or substantively similar *name* existed in Petitioners' database. Petitioners' database was also based on the OEMS, but, because it is slightly outdated in some regards and modified in others, is not an official record of the registration list during the time period. Nonetheless, Petitioners' database is a somewhat useful tool to establish registration. While such evidence alone would be insufficient to positively *prove* registration or non-registration, when combined with Petitioners' other successful rebuttals, it causes us to sufficiently doubt the accuracy of these 14,298 challenges such that these challenges lack the necessary clear and convincing proof of non-registration.

We must therefore deny these challenges and uphold these signatures as valid.

¶ 25 The number of successful challenges to signatures by Opponents thus stands at 26,290. This number falls short of the 29,864 required to invalidate the initiative petition on the basis of numerical insufficiency. We find 73,460 of the total 99,750 signatures determined by the Secretary of State are valid. As such, we hold that the initiative petition is numerically sufficient to be presented on the ballot for a vote of the people.

CONSTITUTIONAL CHALLENGES

¶ 26 Generally, we decline to declare an initiative invalid prior to a vote of the people except when there is a 'clear or manifest' showing of unconstitutionality. *See, e.g., In re Initiative Petition No. 362, State Question No. 669,* 1995 OK 77, ¶ 12, 899 P.2d 1145, 1151, citing *In re Initiative Petition No. 358, State Question No. 658,* 1994 OK 27, ¶ 7, 870 P.2d 782, 785. Accordingly, we decline consideration of the issues advanced by Opponents relative to asserted constitutional invalidity of the instant initiative petition.

CONCLUSION

¶ 27 From examination of all the evidence we conclude the petition is valid in the form required by statutes, that the petition is signed by a sufficient number of legal voters of this state, and that the petition should be submitted to the people for determination. Accordingly, we hold that the initiative petition is legally sufficient numerically and that the ballot title meets the standards for submission to the people.

¶ 28 INITIATIVE PETITION NO. 365 IS DECLARED SUFFICIENT FOR SUBMISSION TO THE VOTE OF THE PEOPLE OF THE STATE OF OKLAHOMA AS STATE QUESTION NO. 687.

¶ 29 HARGRAVE, C.J., WATT, V.C.J., HODGES, LAVENDER, OPALA, KAUGER, BOUDREAU and WINCHESTER, JJ.,;

¶ 30 SUMMERS, J., NOT PARTICIPATING.

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN RE INITIATIVE)
PETITION NO. 365,)
STATE QUESTION NO. 687,) NO. 94,155

ORDER

(Filed Jul. 2, 2002)

The court notes the November 27, 2001 letter by Larry L. Oliver, Esq., to Justice Winchester, filed herein November 29, 2001, by which that justice's fitness to participate in this proceeding appears to have been drawn into question. The letter must be and is accordingly treated as a challenge to the justice's qualification to sit in and decide this cause. On due consideration of Mr. Oliver's November 27, 2001 quest, the court refuses to disqualify Justice Winchester for want of any tenable legal grounds for his recusal.

On consideration of the petition for rehearing and of all the paperwork placed on file in that process, rehearing is granted, the court's November 13, 2001 opinion herein is ordered withdrawn and substituted for that court's pronouncement is the *per curiam* opinion filed this day. ***Rehearing addressed to today's opinion must be filed within 10 days of the date hereof.***

DONE BY THE ORDER OF THE SUPREME COURT IN CONFERENCE THIS 2nd DAY OF JULY, 2002.

/s/ Rudoph Hargrave
CHIEF JUSTICE

FOR REFUSAL TO DISQUALIFY JUSTICE WINCHESTER: HARGRAVE, C.J., WATT, V.C.J., HODGES, LAVENDER, OPALA, KAUGER AND BOUDREAU, JJ., CONCUR; SUMMERS and WINCHESTER, JJ., NOT PARTICIPATING.

FOR GRANTING REHEARING AND SUBSTITUTING TODAY'S PRONOUNCEMENT FOR THE OPINION PROMULGATED HEREIN ON NOVEMBER 13, 2001: HARGRAVE, C.J., WATT, V.C.J., HODGES, LAVENDER, OPALA, KAUGER, BOUDREAU AND WINCHESTER, JJ., CONCUR; SUMMERS, J., NOT PARTICIPATING.

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

ATTORNEY GENERAL W.A. DREW EDMONDSON et al., Defendants/Petitioners,	)	No. 98,754
v.	)	
JEFFREY PEARCE et al., Plaintiffs/Respondents.	)	

CERTIFICATE OF DISQUALIFICATION

(Filed Jun. 18, 2003)

Because I am convinced that an objective reader, upon cursory examination, would find *the tone and text of the assault* on my fitness – as a neutral judge in this proceeding – to raise a threshold question of whether one so vigorously challenged to a predecisional gladiatorial encounter with a party litigant could function as a detached arbiter in this controversy. I am constrained to and do disqualify from participation in the consideration and decision of this cause. See *Mayberry v. Pennsylvania,* 400 U.S. 455, 464-466, 91 S.Ct. 499, 504-505, 27 L.Ed.2d 532 (1971).

Done on this 18th day of June, 2003

/s/ Marian P. Opala
MARIAN P. OPALA
Vice Chief Justice

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ATTORNEY GENERAL W.A. DREW EDMONDSON ET AL., Petitioner, v. JEFFREY PEARCE ET AL., Respondents.	)	No. 98,754

REFEREE'S REPORT

(Filed Jun. 24, 2003)

MAY IT PLEASE THE COURT:

This is a proceeding originally calling for the recusal of eight sitting Justices of this Court, undertaken as a preliminary matter in an original proceeding filed by the Attorney General and others. The question of the recusal of the eight sitting Justices was directed to the undersigned referee by an Order of Reference issued January 30, 2003, with directions to hear the parties' claims, and to make a report thereof to this Court together with findings of fact and conclusions of law. By order of June 18, 2003, Justice Opala certified his own disqualification, and on June 19, 2003, the respondents dismissed their application for recusal insofar as it relates to Vice Chief Justice Opala, leaving before the referee the question of the recusal of seven sitting Justices. Now this 24th day of June, 2003, having fully performed the Order of Reference, the undersigned hereby makes return of the same.

Evidentiary proceedings were commenced at 9:30 a.m. on Monday, the 23rd day of June, 2003. The respondents appeared by counsel Larry Oliver of Tulsa, Oklahoma, and by Tom C. Lane, Sr., of Sapulpa, Oklahoma, and the petitioner appeared by Assistant Attorney General Sherry A. Todd of Oklahoma City, Oklahoma. The respondents produced three witnesses, one documentary exhibit, and as the principal part of their case asked the Court to take judicial notice of its own records. The evidence was closed at 11:30 a.m. Closing arguments were heard, and the issues tendered were taken under advisement. The proceedings were stenographically recorded by Ms. Susan Fenimore, whose transcriptions are to be filed with the Clerk of the Supreme Court as the only official account of the hearings.

This original proceeding comes to the Court as a sequel to its July 2, 2002 decision *In re: Initiative Petition No. 365, State Question No. 687*, 2001 OK 98, 55 P.3d 1048, in which the Court rejected the respondents' signature challenge, and found the initiative petition numerically sufficient for submission to a vote of the people. The respondents' application for recusal in the instant case centers on the idea that the Court's decision in the antecedent case was so legally and factually incorrect as to be explainable only by bias and prejudice against the practice of cockfighting, and that the continued participation in the suit by the seven challenged Justices gives the appearance of impropriety. Among the respondents' complaints is the Court's failure in the antecedent case to fully follow the findings and conclusions embodied in the Corrected Referee's Report of November 28, 2000.

For their first witness, the respondents called Anthony Sammons, a fiscal analyst for the Oklahoma State

Senate to give evidence as to statements that were allegedly made at a meeting of the Senate Finance Committee. On the advice of counsel, Mr. Sammons asserted the immunity afforded under the Speech or Debate Clause of Art. 5, § 22 of the Oklahoma Constitution and declined to respond to counsel's questions. The respondents made an offer of proof for the record that if the witness were required to answer the questions propounded to him, he would testify that Chief Justice Watt appeared before the Senate Finance Committee, and when asked why the Court did not follow the recommendation of their own referee in the cockfighting case, he responded to the effect that the Court was not obliged to follow the referee's recommendation.

For their next witness, the respondents called Vice Chief Justice Opala who appeared under subpoena. In response to questioning as to the practice of his chambers, and the chambers of the other Justices in reviewing the record in the cockfighting case, Justice Opala invoked the principle that Court's deliberative processes were not open to inquiry.

The respondents' final witness James Murray Talley testified to having been present in the gallery of the Oklahoma House of Representatives on Thursday, May 10, 2001, to listen to debate and observe the voting on a measure that would amend state law in a manner sought by cockfighting advocates. Mr. Talley testified that one of the representatives voting against the measure was Susan Winchester, the wife of Justice James Winchester.

The documentary exhibit offered by the respondents is a voluminous set of newspaper clippings from the Daily Oklahoman spanning roughly three years, tending to show

that the issue of cockfighting in Oklahoma is fairly controversial, and that the editorial policy of the Daily Oklahoman appears to favor the ban on cockfighting.

The greater part of the respondents' evidence is made up of documents on file in this Court, which came into the record by way of judicial notice. These documents are compiled in an aid to the Court, referenced as exhibits "A" through "M." The first such document is this Court's opinion of June 20, 2000 *In re: Initiative Petition No. 365, State Question No. 687*, 2000 OK 47, 9 P.3d 78, which disposed of the respondents' motion to dismiss the initiative petition, because the identities of the proponents were not disclosed as required by 34 O.S.1999 Supp. § 2. The respondents focuses on the final sentence of ¶ 14 of that opinion:

> We observe that the protestants knew well who the proponents in this process were, in spite of their objections to the contrary.

The respondents suggest that this document, and the quoted sentence reflect the first hint of bias, and that the significant point should not be that the respondents themselves knew the identity of the proponents, but that the public and potential signers of the petition should be allowed to know.

The respondents next point to the November 28, 2000 Referee's Report in cause No. 94,155, followed by the Court's initial opinion, dated November 13, 2001, in the same cause. The respondents argue that the opinion, authored by Justice Winchester, in which seven other Justices concurred was factually at odds with the Referee's Report, and even failed to mention that the case had ever been before a referee.

Respondents direct the Court's attention to a letter from their attorney to Justice Winchester, sent approximately two weeks after the opinion referenced in the foregoing paragraph, asking that Justice Winchester recuse himself for possible bias.

The respondents next direct the Court's attention to their petition for rehearing in cause No. 94,155, which articulates their complaints with Justice Winchester's November 13 opinion.

Respondents next direct the Court's attention to their petition and brief for rehearing of the July 2, 2002 opinion – the Court's second opinion on the signature challenge. In this document, the respondents compare and contrast the two opinions as a foundation for their argument that the eight Justices who joined in the first opinion "on the left side of the moon" could have subsequently joined without dissent in the second opinion "on the right side of the moon" only as a result of their bias against the respondents.

The respondents point to this Court's order of July 2, 2002 in cause No. 94,155 in which the Court memorialized its refusal to order the disqualification of Justice Winchester, and also to substitute the second petition on rehearing in the place of the first opinion authored by Justice Winchester. The respondents' arguments in the instant matter impute the possibility of an improper motive to the Court – some intent to hide or conceal the first opinion by substituting the opinion on rehearing for its predecessor, as if the first had never existed. But one of the respondent's inquiries directed to Justice Opala tended to negate any such inference, establishing that the substitution of an opinion after rehearing in the place of, and under the same

number as the preceding opinion has invariably been the Court's practice over the years.

The respondents direct the Courts attention further to the per curium opinion of July 2, 2002, in cause No. 94,155, and to their reply brief on the issues tendered by their petition for rehearing to further demonstrate the particulars of their disagreement with the Court's decision in the cockfighting signature challenge. The respondents argue their reply brief shows that the Court was misled by the proponents' brief as to the contents of the record, and that the Court accepted the proponents' statements without checking the record. The respondents point out that according to the Court's appearance docket, the record, consisting of tens of thousands of documents, and thousands of pages of transcript was only sent up from the clerk's office 18 days prior to the July 2, 2002 opinion. Respondents argue that the eight Justices could not have fully reviewed such a record in only 18 days.

The respondents direct the Court's attention to their July 22, 2002 petition for recusal in cause No. 94,155, and the Court's order of August 7, 2002 denying the post-rehearing request for recusal where, among other things, the Court finds that the motion calling for the disqualification of Justice Winchester based on his wife's voting record on House Bill 1375 was legally insufficient to support a charge of bias. The respondents further direct the Court's attention to their August 14, 2002 petition for rehearing directed to the order denying the post-rehearing motion for recusal, as that document amplifies the arguments on the claim of bias.

Lastly, the respondents ask the Court to take judicial notice of a photocopy of a page taken from the House

Journal, showing that on Thursday, May 10, 2001, Representative Susan Winchester was listed among the "nay" voters on House Bill 1375. This last document was determined not to be a fit subject for an exercise of judicial notice, but in any event was regarded as redundant to the competent testimony of the witness James Talley, who established beyond question that Representative Susan Winchester did indeed vote against House Bill 1375.

The respondents have attempted to make much of the fact that the Court failed to approve the Referee's Report in cause No. 94,155. In this regard, the referee takes notice that the Court regularly declines to follow referee recommendations in whole, or in part, and that this is in no way remarkable. Moreover, objective comparison of the Corrected Referee's Report of November 28, 2000 in cause No. 94,155 with the Court's opinion on rehearing of July 2, 2002, reveals that the Court accepted nearly all of the Referee's findings and conclusions, excepting only the weight and credibility given to the respondents' proof of non-registration.

The respondents' major theme is that the Court's bias is palpable from the wrongness of its decisions in the cockfighting signature challenge. The respondents argue that Justice Opala has set an appropriate example for the remaining seven justices by certifying his own disqualification, and argue that at the very least, Justice Winchester should similarly be ordered disqualified. In response, the petitioner in the instant case points out that the respondents' special grounds for the disqualification of Justice Opala rested on allegations of his closeness to the Daily Oklahoman, which is a separate issue from the general allegations of bias leveled against the balance *of* the Court.

CONCLUSIONS OF LAW

The respondents' claim of bias as to Justice Winchester, being grounded in the fact that Justice Winchester's wife in her role as a State Representative voted against a particular piece of legislation, has previously been found by the Court to constitute a legally insufficient basis for disqualification, in a related case involving these respondents. The doctrine of settled-law-of-the-case bars relitigation of that claim. *In the Matter of the Application of Eaton Enterprises*, 2003 OK 14, 65 P.3d 277. The respondents' claims of bias as to the seven-Justice panel before whom this matter now pends are based exclusively on perceived errors in this Court's published opinion and other decisions in the cockfighting signature challenge, cause No. 94,155. The respondents have produced no evidence of any extrajudicial acts or statements tending to show bias or prejudice by any members of the panel. The fact that a Court may have ruled against a litigant in one or more matters may not be used as basis for disqualification, *Robertson v. Humphries,* 1985 OK 46, 708 P.2d 1058; *Oklahoma Company v. O'Neil,* 1968 OK 63, 440 P.2d 978. The respondents' evidence is insufficient to demonstrate either bias or an appearance of impropriety on the part of the panel of seven sitting Justices of this Court, or of any individual Justice. The application for recusal should be denied.

Respectfully submitted this 24th day of June, 2003.

/s/ Gregory W. Albert
GREGORY W. ALBERT,
REFEREE

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ATTORNEY GENERAL W.A. DREW EDMONDSON, et al.,	)	
Petitioners,	)	
v.	)	No. 98, 754
JEFFREY PEARCE, et al.,	)	
Respondents.	)	

ORDER

(Filed Sept. 8, 2003)

¶1 Original jurisdiction is assumed as to the issue of disqualification of seven sitting Justices of the Oklahoma Supreme Court, with other issues to be subsequently considered.

¶2 Now before the Court are the Respondents' June 27, 2003 Motion to Reconsider (treated as the functional equivalent of exceptions to the Referee's Report of June 24, 2003), Additional Exceptions to Referee's Report on Justice Disqualification Issues and Request to Reopen Evidentiary Hearing filed by Respondents on July 17, 2003, and Respondents' Supplemental Authorities to Their Additional Exceptions to Referee's Report on Justice Disqualification Issues and Request to Reopen Evidentiary Hearing of September 2, 2003. Petitioners' Response of July 18, 2003 indicated no exceptions to the Referee's Report of June 24, 2003.

¶3 Upon due consideration, Respondents' Motion to Reconsider/Exceptions to the Referee's Report of June 24, 2003 and Respondents' Request to Reopen Evidentiary Hearing are **DENIED**. To the extent Respondents' Request to Reopen Evidentiary Hearing includes a reiteration of an issue previously ruled upon in this case, we treat Respondents' reiterated request for discovery regarding recusal issues as the functional equivalent of a Petition for Rehearing regarding this Court's Order of June 20, 2003 denying Respondents' Petition to the Supreme Court For Instructions To Referee Albert on the Discovery Issues Related to the Pending Recusal Proceedings. Therefore, Respondents' requests for discovery regarding recusal issues are **DENIED with prejudice** to future filings of Petitions for Rehearing. Okla.Sup.Ct.R. 1.13(g)(4.).

¶4 Upon due consideration of Respondents' arguments and evidence presented at the evidentiary hearing of June 23, 2003, this Court determines that Respondents have failed to show any tenable legal grounds to require disqualification of any of the seven sitting Justices of this Court. Therefore, Respondents' Application to Recuse the Justices of the Oklahoma Supreme Court is **DENIED**. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Robertson v. Humphries,* 1985 OK 46, 708 P.2d 1058; *Oklahoma Co. v. O'Neil,* 1968 OK 63, 440 P.2d 978, *Pierce v. Pierce,* 2001 OK 97, 39 P3d 791.

¶5 Eleven Boxes containing exhibits offered into evidence in the matter of #94,155, which resulted in *In re Initiative Petition No. 365, State Question No. 687*, 2001 OK 98, 55 P.3d 1048, were received by the Clerk of the Supreme Court on or about November 2, 2000, upon conclusion of evidentiary proceedings in that matter. The exhibits shall be deemed filed on the date of receipt by the

Clerk of the Supreme Court. Okla.Sup.Ct.R. 1.4(b)(2). Therefore, Respondents' Request to Reopen Evidentiary Hearing on the basis that the exhibits "were apparently never filed with the Court Clerk according to the OSCN docket in Case No. 94,155 and never accessed by the challenged Justices" is **DENIED**.

¶6 Respondents are directed to file a brief in response to the Petitioner's Application to Assume Original Jurisdiction and Petition for Declaratory Relief within thirty (30) days of the date of this Order. Petitioner may file a reply brief within twenty (20) days after the filing of the Respondents' brief.

¶7 **DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 8th DAY OF SEPTEMBER, 2003.**

/s/ Joseph M. Watt
CHIEF JUSTICE

WATT, C.J., HODGES, LAVENDER, HARGRAVE, KAUGER HOUDREAU and WINCHESTER, JJ., concur.
SUMMERS, J., not participating.
OPALA, V.C.J., disqualified.

APPENDIX I

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(Filed June 7, 2004)

Monday, June 7, 2004

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

98,754 A.G. W.A. Drew Edmondson et al v. Jeffrey Pearce et al

Petition for rehearing is denied.
CONCUR: Watt, C.J., Hodges, Lavender, Hargrave, Kauger, Boudreau, Winchester, JJ.
DISQUALIFIED: Opala, V.C.J., Edmondson, J.

* * *

/s/ Joseph M. Watt
CHIEF JUSTICE

(2)

No. 04-329

Supreme Court, U.S.
FILED
OCT 12 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES TALLY, *et al.*,

Petitioners,

v.

W.A. DREW EDMONDSON,
Attorney General of Oklahoma, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Supreme Court

BRIEF IN OPPOSITION

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The following are Respondents in this brief: Oklahoma Attorney General W.A. Drew Edmondson, Oklahoma District Attorneys, Virginia D. Sanders, John David Luton, James Thornley, Richard Gray, Mitchell D. Sperry, Robert E. Christian, Robert C. Schulte, Eddie Wyant and Max Cook, the Governor of Oklahoma and the Oklahoma State Bureau Of Investigation.

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STATEMENT OF THE CASE

In November, 2002, Oklahoma voters passed the Anti-Cockfighting Law which had been placed on the ballot via Initiative Petition No. 365. Although Petitioners set out at some length the numerous proceedings that were conducted concerning the validity of the signatures filed with that Initiative Petition, they concede that no review of the Orders issued is before this Court. Petitioners failed to petition for a Writ of Certiorari in that case.

Immediately following the certification of the 2002 November election results, cockfighting proponents began filing applications for temporary restraining orders to bar the enforcement of the law. Defendants included the district attorneys and sheriffs in the counties, as well as the Oklahoma State Bureau of Investigation. They further challenged the constitutionality of the new law upon numerous grounds. Only those counties where the question of the Anti-Cockfighting Law had failed were targeted.

When over twenty-five (25) Petitions had been filed in over twenty-five (25) different counties, the Oklahoma Attorney General filed an Application to Assume Original Jurisdiction and Petition for Declaratory Relief on January 15, 2003. Petitioners then filed their application to recuse the Oklahoma Supreme Court Justices *en banc* based upon the Court's rulings in the proceedings concerning the Initiative Petition. The Court appointed a Referee to conduct hearings on the application to recuse.

Vice-Chief Justice Opala disqualified when Petitioners' filed an additional application to disqualify him citing a newspaper article in *The Daily Oklahoman* that listed Justice Opala as one of the individuals who had attended a

trip to celebrate the paper's anniversary. *The Daily Oklahoman* supported the Anti-Cockfighting Law. Justice Summers did not participate and Justice Edmondson disqualified due to his relationship with Attorney General Edmondson.

Petitioners were allowed to present both documentary and testimonial evidence at the disqualification hearing. They issued a subpoena to Justice Opala who appeared and answered questions which were not prohibited by judicial immunity. The Oklahoma Supreme Court determined that Petitioners were unable to present any legal reasons that the remaining Justices should recuse.

On March 30, 2004, the Oklahoma Supreme Court issued an Opinion accepting original jurisdiction and declaring the Anti-Cockfighting Law to be constitutional. The Petition for Rehearing was denied. Petitioners are now before this Court on a Petition For Writ Of Certiorari To The Oklahoma Supreme Court. Petitioners allege that they were denied due process in the disqualification hearing and that the Anti-Cockfighting Law is unconstitutional.

REASONS FOR DENYING THE WRIT

The grant of certiorari is inappropriate to consider. First, Petitioners' complaints are based on the Oklahoma Supreme Court's denial of their motion to disqualify the entire membership of the Oklahoma Supreme Court, which was mainly based on Petitioners' allegations of incorrect, adverse decisions by the Court in a previous case. When there is no pecuniary, direct, personal or substantial interest, there is no extra-judicial prejudice.

Petitioners were granted a full and fair hearing on their complaints. Petitioners failed to apply for a Writ of Certiorari in the previous case.

Contrary to Petitioners' allegations that the Justices have ignored the precedents of State and Federal law concerning disqualification, the Oklahoma Supreme Court has had three Justices recuse or disqualify during the pendency of the case – Justice Summers, Justice Opala and Justice Edmondson. The Justices' decisions on the recusal issues are findings of fact and should not be considered by this Court. U.S. S.Ct. Rule 10. The granting of certiorari is inappropriate in regards to the Oklahoma Supreme Court's decision that the Anti-Cockfighting Law is constitutional. The Oklahoma Supreme Court determined that the attacks on the law were without merit and in doing so applied the correct standards.

I. The Oklahoma Supreme Court Based Its Decision To Refuse To Disqualify Upon Well Established State And U.S. Supreme Court Precedent.

A. No direct, personal, substantial or pecuniary interest can be attributed to the sitting Justices.

Petitioners argue that the Oklahoma Supreme Court failed to apply the standards in *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001) when it denied the Application to Recuse the Justices of the Oklahoma Supreme Court. Petitioners further claim that the Oklahoma Supreme Court ignored this Court's holding in the *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) case. This argument is without merit as the Oklahoma Supreme Court cited these cases in

its Order denying the Application to Recuse the Justices of the Oklahoma Supreme Court. (Petitioners' App. 135.)

The facts in *Aetna*, wherein this Court vacated the decision of the Alabama Supreme Court, are distinguishable from the instant case. In *Aetna*, when appellant insurer refused to pay the full amount of a hospital bill incurred by appellees, they brought suit in an Alabama state court, seeking payment of the full amount and punitive damages for appellant's alleged bad-faith refusal to pay a valid claim. The jury awarded $3.5 million in punitive damages. The Alabama Supreme Court affirmed, 5 to 4, in a *per curium* opinion written by Justice Embry. Appellant filed an application for rehearing. Before the application was acted upon, Appellant learned that while the case was pending before the Alabama Supreme Court, Justice Embry had filed two actions in an Alabama court against insurance companies alleging bad-faith failure to pay claims and seeking punitive damages. One of the actions was a class action on behalf of all state employees insured under a group plan by Blue Cross and Blue Shield. Appellant filed motions challenging, on due process grounds, Justice Embry's participation in the *per curiam* decision and his continued participation in the case. Appellant also alleged that all justices on the court should recuse themselves because of their interests as potential class members in the Blue Cross suit. The Alabama court denied both motions. *Id.* at 813, 814.

This Court, in considering the due process challenge, determined that only in the most extreme of cases would disqualification on the allegations of bias or prejudice by a judge ever be sufficient under the Due Process Clause to force recusal. This Court found that "allegations of bias and prejudice on this general basis, however, are insufficient to

establish any constitutional violation." *Id.* at 821. This Court determined that there was no basis for concluding that the justices of the Alabama Supreme Court other than Justice Embry were disqualified under the Due Process Clause. While those justices might conceivably have had a slight pecuniary interest in this case because of their possible inclusion in the Blue Cross class action, that interest cannot properly be characterized as "direct, personal, substantial, [and] pecuniary." This Court determined that because of Justice Embry's leading role in the decision under review, the "appearance of justice" would best be served by vacating the decision and remanding for further proceedings. *Id* at 828.

Petitioners' allegation that Justice Opala's disqualification could somehow affect their due process rights is wholly unsupported by fact. Justice Opala disqualified and took no part in the decision in *Edmondson v. Pearce*, 91 P.3d 605 (2004), unlike Justice Embry in *Aetna*. Justice Opala disqualified based upon the "appearance of impropriety," not because of any wrongdoing or bias. (Petitioners' App. 125.) To intimate that he influenced the other Justices' decision in *Edmondson v. Pearce* when he didn't join in the deliberation is absurd. None of the remaining Oklahoma Justices can be characterized as having a direct, personal, substantial or pecuniary interest in this case. Petitioners' arguments are insufficient to invoke the scrutiny of this Court.

B. There is no evidence that the Justices have personal knowledge of disputed evidentiary facts gained in an extrajudicial capacity.

In the instant case, Petitioners have alleged only general accusations of bias and prejudice against the

seven sitting Justices. The facts in an application to recuse must allege extra-judicial bias.

Personal knowledge of disputed evidentiary facts gained in an extrajudicial capacity is grounds for recusal. *United States v. Heldt*, 668 F.2d 1238, 1274 (D.C. Cir. 1981). Bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Petitioners' argument is totally devoid of any specific factual allegations of an extrajudicial source of personal knowledge of disputed facts on the part of any of the sitting Justices.

Petitioners claim that the Oklahoma Supreme Court's adverse rulings in *In re Initiative Petition No. 365, State Question No. 687*, 2001 OK 98, 55 P.3d 1048 are the basis for their allegations of bias and prejudice in this case. Adverse rulings do not form a basis for disqualification. *Robertson v. Humphries*, 708 P.2d 1058, 1061 (Okla. 1968). Many of Petitioners' allegations are without reference to the record or other documentation.

C. The question of whether a judge's impartiality can be reasonably questioned is to be made in light of facts as they existed, not as they were surmised.

The standard for disqualification of a judge is "would a reasonable person knowing all the facts surrounding the application for recusal harbor doubts as to the impartiality of the judge?" The decision whether a judge's impartiality can "'reasonably be questioned'" is to be made in light of

facts as they existed, and not as they were surmised or reported. Memorandum of Justice Scalia in *Richard B. Cheney v. United States District Court for the District of Columbia*, 541 U.S. ___ (2004) citing *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000).

In addition, a judge has a strong duty to sit when there is no legitimate reason to recuse which is as strong as the duty to recuse when law and facts require. There is no reasonable factual basis alleging or requiring the recusal of any of the challenged Justices. *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995). Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion and similar non-factual matters are not sufficient to require recusal. *Id.* Petitioners' general allegations of bias and prejudice are based upon speculation and innuendo and are insufficient to require recusal.

II. The Oklahoma Supreme Court Correctly Ruled That The Anti-Cockfighting Law Is Constitutional Within The Requirements Of The Due Process Clause.

A. Oklahoma Supreme Court general standard of review – constitutionality of statute.

In its opinion declaring the Anti-Cockfighting Law to be constitutional, the Oklahoma Supreme Court cited *Fent v. Oklahoma Capitol Improvement Authority*, 984 P.2d 200, 203, *cert. denied*, 528 U.S. 1021 (1999) for the general rules concerning the standard of review applicable when a statutory enactment is attacked on constitutional grounds. *Edmondson v. Pearce*, 91 P.3d 605, ¶17 (2004) In *Fent*, the Court said:

> In considering a statute's constitutionality, courts are guided by well established principles. A heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality and every presumption is to be indulged in favor of the constitutionality of a statute. If two possible interpretations of a statute are possible, only one of which wound render it unconstitutional, a court is bound to give the statute an interpretation that will render it constitutional, unless constitutional infirmity is shown beyond a reasonable doubt. A court is bound to accept an interpretation that avoids constitutional doubt as to the legality of a legislative enactment.
>
> It is also firmly recognized that it is not the place of this Court, or any court, to concern itself with a statute's propriety, desirability, wisdom, or its practicality as a working proposition. [T]he judiciary cannot challenge the wisdom, need or desirability of any constitutionally valid legislation. Such questions are plainly and definitely established by our fundamental law as functions of the legislative branch of government. Respect for the integrity of our tripartite scheme for distribution of governmental powers commands that the judiciary abstain from intrusion into legislative policymaking. A court's function, when the constitutionality of a statute is put at issue, is limited to a determination of the validity or invalidity of the legislative provision and a court's function extends no farther in our system of government. *Id.* (Citations omitted)

(Petitioners' App. 16, 17.)

The Oklahoma Supreme Court did not concern itself with the desirability of the law in this case. They limited their judicial function to determining the validity or

invalidity of the law. As such, Petitioners have not been denied due process of law.

B. Petitioners assert the definition of "cockfight" or "cockfighting" is unconstitutionally vague and overbroad in failing to distinguish between innocent conduct and alleged harmful conduct.

The Oklahoma Anti-Cockfighting Law defines "cockfighting" as "a fight between birds, whether or not fitted with spurs, knives, or gaffs, and whether or not bets or wagers are made on the outcome of the fight, and includes any training fight in which birds are intended or encouraged to attack or fight with one another." 21 O.S. § 1692.1(A) (Petitioners' App. 3, fn. 1.)

Petitioners urge this Court to look at the definition only as a "fight between birds." When the definition is read in context, it is clear that cockfighting and training fights are the prohibited acts. Numerous animal fighting/cockfighting laws contain the term "birds."

The federal statute prohibiting animal fighting utilizes the term "live birds" 7 U.S.C. § 2156 (Petitioners' App. 42-45.) Other states use the term "bird" in their statutes which prohibit cockfighting. A small sample follows: California Penal Code § 597C: Fighting animals or birds – Whoever owns, possesses, keeps or trains any bird or animal, with the intent that such bird or animal shall be engaged in an exhibition of fighting, or is present at any place, building or tenement, where preparations are being made for an exhibition of the fighting of birds or animals, with the intent to be present at such exhibition or is present at such exhibition is guilty of a misdemeanor;

Colorado Rev. Stat. Ann. § 18-9-204: Killing Animals or Birds in Contest – It is unlawful for any person to advertise offer to conduct or conduct, or otherwise promote any contest or competition involving two or more persons when the object of the contest or competition is the killing of animals or birds; D.C. Code Ann. § 810: Any person who sets on foot, instigates, promotes, carries on or does any act, as assistant, umpire, or principal, or attends or in any way engages in the furtherance of any fight between cocks, fowls, or other birds, or dogs, bulls, bears, or other animals, premeditated by any persons owning or having custody of such birds or animals, is guilty of a misdemeanor.

In *Edmondson v. Pearce*, *supra*, the Oklahoma Supreme Court correctly held:

> although Respondents criticize the law for broadly encompassing 'all birds' instead of specifically limiting its prohibition to the fighting of 'cocks,' that no authority is cited in support of the premise that the category of 'all birds' is somehow constitutionally suspect. Respondents fail to illustrate how the sweep of a statutory category of birds renders the Act vague and/or how it impinges on First Amendment rights or otherwise infringes upon constitutionally protected conduct. Instead, they attack the definition generally because it 'fails to make any distinction between normally proper and allegedly improper behavior' and therefore 'invites, encourages and supports law enforcement abuses that will infringe upon the lives of every citizen who has traditionally enjoyed the nature of all birds, including their natural fights for food, or for survival.'

In our view, the Act is notably absent any language (such as discretion to law enforcement officers to determine whether a violation of the statute has occurred[1]) that would suggest law enforcement application in any way other than evenhandedly, and Respondents fail to persuasively demonstrate how the Act, as written, invites law enforcement abuse. Rather, '[t]he language of the [statute] is sufficiently clear that the speculative danger of arbitrary enforcement does not render the [statute] void for vagueness.' *Village of Hoffman Estates v. Flipside Estates, Inc*, 455 U.S. 489, 503 (1982).

The Supreme Court has stated 'the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.' *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Further, with respect to vagueness challenges, the Supreme Court has provided "'it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973), quoting *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578-78 (1973).

---

[1] The criminal provision in *Kolender v. Lawson*, 461 U.S. 352 (1983), was struck down as "unconstitutionally vague on its face because it encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.* at 361.

Respondents' reliance on *City of Chicago v. Morales*, 527 U.S. 41 (1999) to support their challenge is misplaced. The legislation at issue in *Morales* was a 'loitering' provision, the definition of which was clear, but the uncertainty there was due to the ordinance's failure to specify what loitering was covered by it and what was not. In that the enactment involved in *Morales* failed to distinguish between innocent constitutionally protected conduct – 'the freedom to loiter for innocent purposes' being a part of due process 'liberty' rights – and conduct that would subject individuals to prosecution, the Supreme Court struck down the ordinance as unconstitutionally vague and overbroad. *Id.* at 53-55. Unlike the *Morales* situation, the Act here clearly and unambiguously defines the specific conduct of 'cockfight' or 'cockfighting,' which would subject individuals to prosecution. The law on its face does not criminalize the enjoyment and/or observation of the natural activities of birds in their natural habitat. Contrary to *Morales*, here Respondents have failed to identify any constitutionally protected interest at stake. Because they have failed to demonstrate how the definition of 'cockfight' or 'cockfighting' presents any 'realistic danger' that First Amendment protections will be compromised by the statutory definition, they have failed to establish the prerequisite to an overbreadth challenge. *In re Initiative Petition No. 341*, 341, 796 P.2d at 269. The statutory definition of 'cockfight' and 'cockfighting' is not unconstitutionally vague or overbroad. *Edmondson* at ¶¶50-54 (Petitioners' App. 54-56.)

C. Petitioner in this case, James Tally, the President of the Oklahoma Game Cock Breeders Association, has testified that he understands that the Anti-Cockfight Law prohibits cockfighting in Oklahoma.

Long ago, the Oklahoma Court of Criminal Appeals, recognized that the legislature in the exercise of its police power could outlaw cockfighting in Oklahoma. *Lock v. Falkenstine*, 380 P.2d 278, 284 (Okla. Crim. App. 1963). Oklahoma now has a cockfighting statute in place, a law in accordance with the due process requirements in *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Petitioners argue that it is void for vagueness. Yet, James Tally, President of the Oklahoma Game Cock Breeders Association, and other opponents of the measure have testified that they understand that as of November 8, 2002, the Anti-Cockfighting Law prohibits cockfighting in Oklahoma. (Respondents' App. 1)

Petitioners allege that the terms "instigates," "encourages," "facilitate," "performs any service", and "spectator," are so vague and standardless that they leave the public uncertain as to the specific conduct they prohibit. (Petition 29.) This statement is totally devoid of any reference to the record or supporting facts. The Oklahoma Supreme Court, however, has rejected these same arguments in *Edmondson v. Pearce*, 91 P.3d 605, ¶¶55-62, 67-76 (2004). (Petitioners' App. 57-63, 65-74.)

D. This Court does not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states.

This Court held in *Patterson v. New York*, 432 U.S. 197, 201-202 (1977) (citations omitted), that

> It is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Respondents urge this Court to allow the State to determine the procedures under which it will regulate the Anti-Cockfighting Law. The right to conduct cockfights is not a fundamental right. In fact, the federal government and 48 states have enacted some form of law prohibiting cockfighting. As the Oklahoma Supreme Court correctly held, this law does not offend any constitutional values.

CONCLUSION

Most of the Petitioners' complaints go to a decision that the Oklahoma Supreme Court made in *In Re Initiative Petition, supra*. Although Petitioners state that these proceedings are not before this Court, they give lengthy treatment in the "Background of Litigation" to that case and ask this Court to rely upon those facts to indicate bias and prejudice of the entire Oklahoma Supreme Court. Petitioners did not seek a Writ of Certiorari in that case.

Petitioners were afforded a full and fair hearing in their attempt to disqualify or recuse the entire Oklahoma Supreme Court in the proceedings in the Application to Assume Original Jurisdiction, *Edmondson v. Pearce, supra*. The sitting Justices found that there was no factual or legal basis upon which they should recuse. Due process has been served. In finding the Anti-Cockfighting Law constitutional, the Oklahoma Supreme Court correctly determined that the attacks were without merit and applied the correct standards. Therefore, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

IN THE DISTRICT COURT IN
AND FOR MCCURTAIN COUNTY
STATE OF OKLAHOMA

G. W. POYNER, et al., and others similarly situated,	)	
Plaintiffs,	)	
vs.	)	Case No. CJ-02-642
MIKE WILLEBY, Sheriff of McCurtain County, Oklahoma, et al.,	)	
Defendants.	)	

* * * * * * *

TRANSCRIPT OF HEARING
HAD ON THE 18TH DAY OF NOVEMBER, 2002
BEFORE THE HON. WILLARD DRIESEL
IDABEL, OKLAHOMA

(Filed Dec. 05, 2002)

* * * * * * *

APPEARANCES:

For Sanders and O.S.B.I.: Sherry Todd, of the Attorney General's Office, State of Oklahoma.

For the Plaintiffs: Larry L. Oliver, Attorney at Law,

For the Sheriffs of McCurtain, Choctaw and Pushmataha Counties: Virginia Sanders, District Attorney for the 17th Judicial District, Idabel, Oklahoma.

REPORTED BY:

George Lowrimore, CSR No. 279
Official Court Reporter
Idabel, Oklahoma

* * *

[21] MR. OLIVER: I have no further questions.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MS. TODD:

Q. Ms. Durant, what is your position as far as after this date that the law was effective, on November the 8th of 2002, did cock fighting – as the State of Oklahoma – in the position of the State of Oklahoma, is cock fighting legal or illegal at this point?

A. As far as the entire State of Oklahoma, it's illegal.

MS. TODD: Thank you. I have nothing else.

THE COURT: Anything else?

MR. OLIVER: No other questions.

THE COURT: All right. You can step down. Thank you.

MS. DURANT: Uh-huh.

THE COURT: Call your next witness?

MR. OLIVER: Call Ms. Cogburn.

(Whereupon, the above-named witness was duly sworn to tell the truth, the whole truth and nothing but the truth, after which the following proceedings were had:)

THE COURT: Okay. Please have a seat there.

* * *

[27] Q. Good morning, Ms. Cogburn. I'm Sherry Todd with the Attorney General's office.

A. Good morning.

Q. Uh, Ms. Cogburn, I want to clear up something that Mr. Oliver's statement has been, which is a little bit misleading. The statement is, "If this law becomes effective." Now, do you understand, Ms. Cogburn, that on November the 8th of 2002, as far as the laws of the State of Oklahoma, cock fighting is illegal in the State of Oklahoma. Do you understand that?

A. Yes, ma'am, I do.

Q. Now there is, certainly controversy as well we can all see as to whether that law is constitutional, and that – that is going to be ruled upon at some point. Do you understand that?

A. Yes, ma'am, I do.

Q. But you do understand, and it's very clear, that although the Judge has issued a Temporary Restraining Order as far as the law being enforced in this Judicial District, that as far as the laws of the State of Oklahoma are concerned, as of November the 8th of 2002, cock fighting is illegal.

MR. OLIVER: Judge, I'm going to object to that. That's a compound question and I don't understand it.

* * *

[42] Q. Mr. Hammonds, you say you understand the major concept of what this law means?

A. Yes, ma'am.

Q. What is major content of this law?

A. It make me illegal and will make me a felon.

Q. What would make you a felon?

A. To own a game cock, to talk about a game cock, or own a cage to put game cock in.

Q. At this point, after November the 8th, is it your understanding of the law that cock fighting is illegal?

A. That's right.

MS. TODD: Thank you. Nothing further, Your Honor.

THE COURT: Anything else? Just a minute. Anything else of this witness?

MR. OLIVER: Oh, no, I have nothing further.

THF COURT: Thank you. I do have a question for Mr. Hammonds? Have you ever raised fryers or chickens for human consumption?

A. No, sir, not to my knowledge.

THE COURT: All right. That's all I have. Thank you.

Okay, your next witness.

MR. OLIVER: James Talley

(Whereupon, the above-named witness was duly

* * *

[49] Q. Does Southeastern Oklahoma and the industry generally need this restraining order?

A. Yes, it does.

MR. OLIVER: Nothing further.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MS. TODD:

Q. Mr. Talley, I'm Sherry Todd with the Attorney General's office. Good morning.

A. Good morning.

Q. Tell me again your title with the –

A. I'm the President of the Oklahoma Game Cock Breaders [sic] Association.

Q. In that capacity, I would assume that you've had a lot of questions about this law and its effect upon cock fighting in Oklahoma.

A. Thousands.

Q. Uh, since November the 8th, of 2002, when the results of the vote were certified and this law came into

effect, if I were a member of your Association and called you and asked you, would it be legal or illegal or me to have a cock fight in Oklahoma, what would you tell me?

A. I would tell you it would be illegal.

* * *

[71] CERTIFICATE

STATE OF OKLAHOMA)
) ss.
COUNTY OF McCURTAIN)

I, George Lowrimore, Certified Shorthand Reporter No. 279 in and for the State of Oklahoma, do hereby certify:

That I was present and reported in shorthand the oral proceedings had in the foregoing matter, on the 18th day of November, 2002, before the Hon. Willard Driesel, District Judge for the 17th Judicial District of the State of Oklahoma, sitting in District Court in the City of Idabel, County of McCurtain, State of Oklahoma; that I have since that time transcribed all of my notes taken as aforesaid; and that the foregoing is a full, true and accurate transcript of said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand on this, the 2nd day of December, 2002.

/s/ George Lowrimore
George Lowrimore,
CSR No. 279

[Stamp]